AFTERWORD...

Square 2010

through the Eyes of Belarusian Human Rights Defenders



Legal Transformation Center

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Minsk
"MonLitera"
2012

The Legal Transformation Center is grateful
for active and sincere help to everyone
who contributed to this work:
for assistance in collecting information
and processing transcripts and for other helpful support.

Afterword... Square 2010 through the Eyes of Belarusian Human Rights Defenders / compiled by Marina Adamovich, Tatsiana Ageyeva, Daria Katkovskaya, Alexey Kozliuk, Maria Lugina, Tamara Sidorenko, Elena Tonkacheva and Oleg Fedotov — Minsk, 2012. 164 pages.

Based on the monitoring of criminal processes initiated in connection with the peaceful protest on 19 December 2010 in Minsk, this study gives an account of the preconditions for, and the course of, the proceedings and makes a legal assessment of their compliance with constitutional guarantees and international fair trial standards. The publication is addressed to government officials, scholars, practicing lawyers, law students, human rights defenders and a broader audience of those who have a keen interest in the social and political life in Belarus.

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In memory of Marek Nowicki

On the night between 19 and 20 December 2010 we, the team of the Legal Transformation Center, were far from undertaking to publish this book. We were just doing our job — documenting what was happening. At that time we were simply unable to get an idea of how dramatic the then current events were and which implications they would bring about.

This publication united efforts of many people.

This publication is about responsibility — personal, collective, civil, criminal, political, professional.

This publication is an interim bottom line.

Two years have passed. Publishing this book, we are looking back at the arrests, searches, seizures and interrogations that filled up the first months after 19 December 2010 as something beyond reality. The row of administrative and criminal trials seemed to have no end.

This period has raised our awareness of what international solidarity in human rights defence is: we did our part of the job together.

Yet, a former presidential candidate, Nikolay Statkevich, politicians Dmitriy Dashkevich and Pavel Severinets, a human rights defender Ales Bialyatsky, and others have been deprived of their liberty on political motives. Another former presidential candidate, Andrey Sannikov, and many civil society activists have had to leave Belarus.

Elena Tonkacheva,
Graduate of the First International Course
on Human Rights by the Helsinki Committee in Poland

I. INTRODUCTION

1.1. Structure of This Publication

This is a comprehensive study that should not be viewed as a purely analytical report covering the results of monitoring the criminal trials related to the 19 December 2010 events. The cases are specific in that such a large-scale criminal prosecution of the protest participants was not purely caused by their unlawful actions. The reason should be sought in the social and political structure of today's Belarus. It would not be superfluous to mention that the practice of violating human rights and suppressing civil activity together with post-election spikes of violence are a regular phenomenon in our country. Therefore, it is impossible to limit the study to only providing information about the 19 December evening and quoting facts from subsequent criminal cases as this would be an obvious simplification. The structure of this publication is arranged in the way that the reader gets the most complete data related to the criminal cases under study. This approach, as we see it, gives an opportunity to assess the prerequisites and actual reasons behind the criminal cases in question. The latter will no doubt go down in history as politically motivated. Moreover, besides providing facts, we feel it is our duty to make an unprejudiced legal assessment of both the criminal trials and their outcomes.

The introduction will provide the reader with exhaustive information about the subject matter and objectives of the study and about the methodology used by the Legal Transformation Center. It also includes the criteria used to select the cases and a brief description of the work which was done in the conditions of limited resources and lack of public supervision over the judiciary to collect data for the analysis and assessment of the criminal trials.

The second part describes the facts and socio-political events that, in their aggregate, form the context of the criminal trials. The retrospective outlook of the criminal prosecution of peaceful protesters in Belarus allows considering the 'Decembrists Case' as far from being the first one, though unprecedented in terms of its scale. In turn, some will probably find the reference to the forms of response from the international community to previous facts of human rights violations as a useful reminder to understand the position of various international organizations concerning the current situation. The format in which the cases under study were reported by the state-run mass media is as an important factor distinguishing these cases as going beyond the scope of the criminal process.

The third part is an assessment of the criminal trials for their compliance with constitutional and legislative guarantees as well as fair trial requirements of the international law. The assessment is structured thematically and is viewed as a summarized analysis of the criminal trials. A special focus is made on the observance of separate components of the right to fair trial at the pre-trial and judicial phases and on the general conditions for the conformity of criminal processes with international standards.

The fourth part contains conclusions and recommendations arising out of the study results. The scope of the recommendations is limited to the flaws in the judiciary system detected during the trial monitoring and to the observance of the right to fair trial as related to the criminal trials under study.

1.2. Criteria for Including Criminal Trials into the Monitoring

The monitoring of the criminal trials connected with the events of 19 December 2010 is, in its essence, an *ad hoc* observation. That is, it is necessitated by negative implications generated by a specific event of public importance.[1] Therefore, each of the criminal cases included in the study relates to the peaceful protest action that took place in the evening in Minsk following the presidential elections.

The public importance of these criminal trials is determined by a number of factors. In statements by officials and reports by the state-run mass media, the events at Independence Square in Minsk were referred to as "*an attempted coup d'etat.*" 7 of the 10 presidential candidates were initially detained, with no details of any accusations disclosed. It became known several days later that a criminal case had been instituted for alleged "mass disorders." In this regard, searches were taking place almost every day in the offices of political organizations and NGOs and private homes of civil society activists. Violations of suspects' rights began as early as at the pre-trial investigation phase. For instance, the state-run mass media published search and detection records and state officials referred to the guilt of the protest action organizers' as something already proven, though the criminal trials had not yet started. According to alternative reports, the suspects that were kept in the KGB pre-trial detention center did not receive adequate medical aid and their lawyers' access to them was limited. The lawyers, who made those facts public, experienced severe pressure. Apart from that, there had been no precedent in Belarus yet for the criminal article against mass disorders to be applied.

The total of 14 criminal cases directly connected with the presidential elections and the related peaceful protest action took place between 17 February and 12 October 2011 in Minsk. All court proceedings ended with guilty verdicts. 5 of 10 presidential candidates were convicted. The overall number of the convicts was 44. Three of them, presidential candidates Andrey Sannikov, Nikolay Statkevich and Dmitriy Uss, were sentenced to 5 to 6 years in prison for "the arrangement of mass disorders" (Article 293, Criminal Code of the Republic of Belarus). 10 participants of the protest action, including presidential candidates Vladimir Nekliaev and Vitaly Rymashevskiy, were convicted of "the arrangement of actions gravely violating public order" (Article 342, Criminal Code of the Republic of Belarus). Leaders of the youth organization Young Front (the Czech Republic) Dmitriy Dashkevich and Eduard Lobov, were convicted under Article 339 of the Criminal Code (hooliganism). 28 protest action participants were sentenced for taking part in mass disorders to various types of punishment (2 fined, 3 sentenced to 3-year restriction of liberty, and 24 incarcerated for 3 to 5 years).

The relation of 13 criminal trials to the 19 December protest action is explicit as the defendants either took part in it or acted as its organizers and the charges of violating Articles 293 and 342 of the Criminal Code were directly linked to the said events. As for the case of Dmitriy Dashkevich and Eduard Lobov who were accused of hooliganism (Article 339, Criminal Code) allegedly committed prior to the presidential elections, this relation is implicit and needs further explanation. The both defendants were leaders of the Young Front, a Belarusian youth organization registered in the Czech Republic. Members of this organization, including Dashkevich and Lobov themselves, had been actively involved in the preparation of the post-election protest action, which is proved by the facts pronounced in

1 Ad hoc trial monitoring is seen as a direct response to a limited number of criminal or administrative trials caused by specific events such as post-election surges of violence, unsteady political situation or persecution of journalists and human rights defenders. Such monitoring has a limited cycle dictated by the duration of court proceedings; its final product is a monitoring report. The results can only be disseminated and used outside the monitoring framework itself. Ad hoc trial monitoring is primarily focused on individual cases of human rights violations rather than a broader agenda of reforms in the system of justice. For more information, see: Lawtrend Monitor #2/3, 2012.

court. Avoiding hasty conclusions, it should be nevertheless admitted that the prerequisites for, and the entire nature of, the court proceedings speak in favour of the direct connection between the political activity of the accused prior to the presidential elections, including the protest action preparations, and their detention and subsequent criminal prosecution. For this reason, the Dashkevich and Lobov case is also included in the study as directly linked to the 19 December events.

1.3. Monitoring Data Collection and Analysis Methodology

The data used in this study were collected by the Monitoring Team of the Legal Transformation Center. The team was established to document human rights violations related to the events of 19 December 2010 and, prior to the criminal trials monitoring, already had experience in collecting similar information — about administrative cases against participants of the 19 December peaceful protest action[2]. Data for the study of the criminal trials were collected in two phases which can be nominally designated as "judicial" and "extrajudicial".

At phase 1), the observers attended the court proceedings in person. The total number of observers engaged in the monitoring was seven. In line with the developed methodology, each trial was to be attended by two observers. This could not be managed all the way as the number of simultaneous hearings at times reached five a day. On top of that, many of those willing to attend were unable to do so due to a limited number of seats available in courtrooms. Whereas NGO observers enjoyed no special status (unlike members of the OSCE/ODIHR trial monitoring mission), sometimes only one of two observers was able to get in. The course and content of the court hearings were recorded using a voice recorder; also everything heard and seen was put down in a traditional way — in a notebook. The total time of the audio records is 350 hours. The records were later processed and transcribed into print. Transcripts of court debates were transcribed first of all, many of which were available at our website at the time of the court hearings. Texts of speeches by lawyers and prosecutors are annexed to this publication as an electronic supplement.

Phase 2 was carried out primarily after the public stage of the court trials was over. The Monitoring Team collected procedural documents (first of all, sentences, complaints, and rulings of superior instances) and in parallel monitored the course of appealing. Here we should acknowledge the assistance in collecting documents provided by the Human Rights Center "Viasna," the non-governmental organization "Human Rights Center" and defendants' relatives and lawyers.

The Monitoring Team's long work resulted in the collection of a relatively full database on the studied criminal cases, which made it possible for the research team to make a detailed analysis of the course and results of the criminal trials related to the 19 December events. For the methodology used to assess the criminal trials for their compliance with constitutional guarantees and international legal standards of fair trial, see Section 4.1.

2 *Administrative detentions and court procedures: analysis of the law enforcement practice in the context of freedom of assembly - Minsk: Monlitera, — 2012. — pages 7-42 (Analytical note I-1).*

II. CONTEXT OF THE CRIMINAL TRIALS

2.1. Prosecution of Protesters in Belarus before 2010

The scale of the criminal process against presidential candidates, their proxies and other persons detained in connection with the public events that took place in the evening on 19 December 2010 in Minsk is, for the time being, undoubtedly the largest in terms of both the number of convicts and the number of presidential candidates among them. Nevertheless, as the history of political life in the country shows, the criminal prosecution of the opposition and participants of opposition-oriented political events is nothing out of the ordinary for Belarus. Today it is possible to trace the chronology of criminal prosecution against the opposition in quite a detail from 1989 up to nowadays.[1]

The practice of bringing criminal charges against participants of large-scale public events organized by the opposition for the "arrangement of, or active participation in, actions that gravely violate public order" started in 1996. At that time many participants of the Chernobyl Way '96 demonstration were detained. A number of them were sentenced for either arranging or actively participating in actions that gravely violate public order.[2]

In 1999, a number of opposition activists and politicians were again brought to criminal liability, also for the participation in actions that gravely violate public order. For instance, Valery Shchukin[3] was sentenced for his participation in the Freedom March '99. In 2005 Andrey Klimov, a former businessman and ex-deputy of the Supreme Council (13th Convocation), was convicted of the arrangement of actions that gravely violate public order (Article 342, Criminal Code). In 2005, Nikolay Statkevich, chairman of the Belarusian Social Democratic Party (People's Assembly), was sentenced under Article 342 of the Criminal Code for the arrangement of a street protest against the official version of the results of the parliamentary elections and referendum that both took place in 2004.[4]

In our view, it is especially important to study the situation of bringing criminal charges against opposition politicians and civil society activists in the period between 2006 and 2009, i.e. immediately after the 2006 presidential elections, as it helps better understand the backgrounds for such a large-scale criminal prosecution (for the events of 19 December 2010).

On 13 July 2006, a former presidential candidate A. Kozulin was sentenced to 5.5 years in prison under Article 342, Part 1 of the Criminal Code. He was pardoned by Lukashenko's presidential order on 16 August 2008. The international community responded to A. Kozulin's conviction quite rigorously, which may probably be a possible cause for his pardon. Thus, the practice of convicting presidential candidates in combination with the practice of their release under presidential pardon had formed well before the 2010 presidential elections.

Also, on 14 March 2006, i.e. shortly before the presidential elections, Sergey Leshkevich was arrested and sentenced under Article 293, Part 3 of the Criminal Code (for "training or other form of preparation for the participation in mass disorders as well as

1 Website http://palitviazni.info

2 Andrey Drigailo, Viatcheslav Sivchik, Vladimir Solovey, Sergey Potapov, Yury Hodyka, Andrey Shaptsitskiy, Andrey Mironiuk. For more information, see website http://palitviazni.info

3 See more information at http://palitviazni.info/viazen/valiery-shchukin?lang=en. It should be noted that some participants of the Freedom March '99 were sentenced for grave hooliganism (German Sushkevich, Andrey Volobuyev and Anton Lazarev).

4 See more information at http://palitviazni.info/viazen/mikola-statkevich?lang=en

funding or other form of material support to such activity").[5] S. Leshkevich was a proxy to A. Milinkevich, a presidential candidate. Leshkevich was sentenced to 5-month imprisonment. For the time being, this has been the shortest court sentence for a crime under Article 293 of the Criminal Code.

Starting 2006, there has developed a practice of bringing criminal charges under Article 193-1 of the Criminal Code, i.e. of acting on behalf of an unregistered public organization. More than 20 activists were arrested and convicted under this criminal article. For instance, 4 people were convicted in the Partnership case.[6] The Partnership was a group of observers who monitored the 2006 presidential elections. It should be noted that the state registration of the Human Rights Center "Viasna" was withdrawn first of all for its activity related to the observation over the 2001 presidential elections. Similarly, a number of other activists faced criminal charges under Article 193-1 of the Criminal Code. Their cases were referred in the media reports as the Young Front[7] case and the Denisov & Elayeva case.[8] As for Denisov and Elayeva, they were charged of a crime under Article 342 of the Criminal Code for the arrangement of, and participation in, the tent camp sit-in at October Square in Minsk to protest against the 2006 presidential election results. The criminal charges against the both activists were later dismissed due to the absence of elements of a crime in their actions.

In 2007, the criminal prosecution was mostly focused on the Young Front, an NGO with no registration in Belarus. A number of its members were sentenced under Article 193-1 of the Criminal Code.

In 2008, the criminal prosecution of public activists under Article 342 of the Criminal Code only increased reaching its pinnacle with the so-called Case of the 14.[9] As is well known, the economic situation in Belarus deteriorated in 2008. Yet, the authorities were reluctant to pursue any dialogue with the society, especially with the business. As a result, an unsanctioned rally to support entrepreneurs took place on 10 January 2008. Many participants were brought to administrative liability and a number of activists were prosecuted criminally, under Article 342 of the Criminal Code, i.e. for the arrangement of, or active participation in, actions that gravely violate public order. The sentences imposed by court varied from fines to restraint of liberty with or without imprisonment in an open-type correction facility. The punishment was later withdrawn either through the adoption of an amnesty law or pardon by presidential order or in some cases due to the expiry of the liberty restraint term. Ekaterina Solovyeva, a regional Young Front activist, was also criminally prosecuted under Article 193-1 of the Criminal Code in 2008.

The year 2009 saw the continuation of the court trials against two defendants in the Case of the 14 as well as of the criminal prosecution against N. Avtuhovich and Yu. Leonov.

Thus, by the time the criminal action against the participants of the 19 December 2010 events took place, Belarus had already had a developed and tested practice of simultaneous criminal prosecution of a large number of opposition politicians, including a presidential candidate and civil society activists, under Articles 293 and 342 of the Criminal Code. Also, by practicing a broader use of his right to pardon, the President actually relieved court judges of the necessity to keep to the principle of individualization of punishment and other principles stipulated by the Criminal Code.

5 *While this case is viewed as the first documented fact of bringing to criminal liability under Article 293 of the Belarusian Criminal Code, it should be kept in mind that, according to the statistics, several people were already brought to criminal liability for mass disorders before; at that time, the Criminal Code of 1966 applied.*

6 *Enira Bronitskaya, Timofey Dranchuk, Aleksandr Shalaiko, Nikolay Astreiko. See more information at http://palitviazni.info/sprava/the-partnership-case?lang=en*

7 *See more information at http://palitviazni.info/sprava/the-young-front-case?lang=en*

8 *See more information at http://palitviazni.info/sprava/prawa-lawoj-i-zianisawa (in Russian)*

9 *See more information at http://palitviazni.info/sprava/the-case-of-14?lang=en*

2.2. Response from International Organizations to Human Rights Violations in Belarus

It should be noted that the international community did not stay aside and responded to the deterioration of the human rights situation in Belarus. In total, we can speak about the reaction from four international organizations which monitor the human rights situation in Belarus really closely: the United Nations Organization (UN), the Organization for Security and Cooperation in Europe (OSCE), the European Union (EU) and the Council of Europe (CE).[10] It should also be taken into account that Belarus is a member of the first two.

UN. Despite its elaborate bureaucratic machine and strict commitment to the most accurate implementation of the principles *"to be a centre for harmonizing the actions of nations in the attainment of these common ends"* and *"to develop friendly relations among nations based on respect for the principle of equal rights"* as specified in Article 1 of the UN Charter, the United Nations (acting through its bodies and agencies), however, has been quite clearly and promptly responding to the deterioration of the human rights situation in Belarus since the latter became a sovereign state and up to now.

At the time of the 2006 presidential elections Adrian Severin, the UN Special Rapporteur on the situation of human rights in Belarus, still had a valid mandate. It was he who served as the main mediator between the UN and the Belarusian civil society suppressed by the authorities. Thus, yet in ahead of the 2006 presidential elections, Adrian Severin expressed his *"deepest concern over the detention and beating of presidential candidate Alexander Kozulin; the imprisonment of Vincuk Viachorka, aide of presidential candidate Alexander Milinkevich; the numerous cases of arrest, trial and ill-treatment of independent political activists."* Also, the UN Special Rapporteur expressed his concern about severe pressure on the independent mass media.[11]

As early as 23 March 2006, the Special Rapporteur made an informal statement to the mass media expressing his concern regarding multiple detentions in October Square in Minsk, arrests of president Lukashenko's political opponents and several foreigners. The UN Special Rapporteur called on *"the Government of Belarus to release immediately and unconditionally all political prisoners, and to bring all violations of freedom of expression and of the right of peaceful assembly to an immediate end."* [12] On 24 March 2006 the UN Special Rapporteur urged *"the President and the Government of Belarus"* to stop repressions and *"to engage immediately in a constructive dialogue with all sectors of the Belarusian society."*[13] In parallel, Adrian Severin reiterated his deep concern regarding the ongoing escalation of human rights violations, especially at the time of the crackdown on the tent camp sit-in at October Square in Minsk. He noted that official Minsk had been persistently ignoring his appeals and urged to resume dialogue between the state and the society and release all political prisoners.

On 29 March 2006, a group of seven independent UN human rights experts[14] made a statement in which it expressed *"serious concern over the deterioration of the human rights*

10 It has no sense to address the response from the Commonwealth of Independent States as in most cases it is either lacking or identical to the official position of the Russian Federation and/or the Republic of Belarus.

11 See: Special Rapporteur on situation of human rights in Belarus condemns escalation of violations in ahead of polls http://un.by/en/news/belarus/2006/17-03-06-01.html

12 See: Special Rapporteur on Belarus condemns human rights violations during recent presidential elections http://un.by/en/news/belarus/2006/23-03-06-02.html

13 See: Deploring rights abuses in Belarus, UN expert calls for detainees' release http://un.by/en/news/belarus/2006/24-03-06-03.html

14 Adrian Severin, Special Rapporteur on the situation of human rights in Belarus; Ambey Ligabo, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Hina Jilani, Special Representative of the Secretary-General on the situation of human rights defenders; Lenla Zerrougui, Chair-Rapporteur of Working Group on Arbitrary Detention; Stephen J. Toope, Chair-Rapporteur of Working Group on Enforced or Involuntary Disappearances; and Leandro Despouy, Special Rapporteur on the independence of judges and lawyers.

situation before, during and after the recent presidential election in Belarus."[15] Among other things, the expert group noted the lack of exhaustive information about detainees, the cruel suppression of peaceful demonstrations and called for an *"an independent, prompt and transparent investigation into all allegations of serious human rights violations."*[16]

On 2 May 2006, the UN Special Rapporteur demanded that political prisoners should be released and called for dialogue with civil society and political opposition. Adrian Severin also demanded that *"the Belarusian Government give a clear an immediate sign of its readiness to cease ongoing human rights violations and bring their perpetrators to justice, and invite him, as the Special Rapporteur on the situation of human rights in Belarus, to conduct a fact-finding mission to Belarus at the soonest."*[17] On 27 September 2006, the UN Human Rights Council discussed reports from country Rapporteurs including Adrian Severin's Report of the Special Rapporteur on the Situation of Human Rights in Belarus.[18] In his report, the Special Rapporteur made a summary of the events that took place in Belarus between 2005 and 2006 and inter alia arrived at the conclusion that *"since his last report … the human rights situation in the country had constantly deteriorated to such an extent that the elements usually defining a dictatorship could be seen."*[19] The UN Special Rapporteur also pointed out that Belarus had been ignoring his appeals and demonstrating reluctance to maintain contact with him. It should be noted that Sergey Aleinik, the Belarusian representative to the UN, confirmed the fact adding that Belarus did not accept the mandate of this Special Rapporteur from the very start.

On 19 December 2006 the UN General Assembly, as recommended by the Third Committee, approved a resolution on the status of human rights in Belarus which was supported by 72 member states. 32 delegations voted against it and 69 abstained from voting.[20] The resolution expressed concern that *"the 19 March 2006 presidential election was severely flawed and fell significantly short of Belarus' Organization for Security and Cooperation in Europe commitments."*[21] It should be noted that the Special Rapporteur paid individual attention to the convicted ex-candidate for presidency A. Kozulin, who had been on a long hunger strike while in prison. Adrian Severin urged the Belarusian authorities to provide adequate medical aid to A. Kozulin.[22]

It can be said that since the mandate to the UN Special Rapporteur on the situation of human rights in Belarus expired in 2007[23] the United Nation's response has lost its promptness, and at times there has been no response at all. We believe it has been largely due to the lack of a standing body which would monitor the situation in Belarus and communicate it to the UN Human Rights Council and other bodies on a centralized basis.

Nevertheless, another resolution was adopted in 2007 by the UN General Assembly

15 See: UN human rights experts express serious concern over the deterioration of the human rights situation in Belarus http://un.by/en/news/belarus/2006/30-03-06-01.html

16 See link above.

17 See: Special Rapporteur on situation of human rights in Belarus demands release of political prisoners, urges dialogue with civil society and political opposition http://un.by/en/news/belarus/2006/02-05-06-02.html

18 E/CN.4/2006/36

19 See: Human Rights Council discusses reports on situation of human rights in Sudan and Belarus http://un.by/en/news/belarus/2006/27-09-06-02.html

20 See: General Assembly criticizes human rights abuses in Belarus http://un.by/en/news/belarus/2006/21-12-06-01.html

21 See link above.

22 See: Special Rapporteur expresses deep concern over deteriorating health of Aleksandr Kozulin http://un.by/en/news/belarus/2006/08-12-06-02.html

23 In 2007, Adrian Severin managed to present another report on the situation of human rights in Belarus.

regarding the human rights situation in Belarus (A/RES/61/175)[24]. In this resolution, the UN General Assembly expressed deep concern *"about the failure of the Government of Belarus to cooperate fully with all the mechanisms of the Human Rights Council, in particular with the special rapporteurs on the situation of human rights in Belarus;" "about continuing reports of harassment, arbitrary arrest and detention of up to one thousand persons, including opposition candidates, before and after the election of 19 March 2006;" "about the continuing and expanding criminal prosecutions, lack of due process and closed political trials of leading opposition figures and human rights defenders;"* and *"about the continuing harassment and detention of Belarusian journalists covering local opposition demonstrations."* The UN GA urged Belarus, in particular, *"to cease politically motivated prosecution, harassment and intimidation of political opponents, pro-democracy activists and human rights defenders, [and] students."*

In 2008, the UN General Assembly adopted another resolution regarding the situation of human rights in Belarus (A/RES/62/169)[25],whereby it inter alia expressed deep concern "about the continued use of the criminal justice system to silence political opposition and human rights defenders, including through arbitrary detention, lack of due process and closed political trials of leading opposition figures and human rights defenders." The UN GA urged Belarus "to release immediately and unconditionally all individuals detained for politically motivated reasons and other individuals detained for exercising or promoting human rights."

So, it should be admitted that there was certain response from the UN to the human rights situation in Belarus, also through recommendations in the Report of the Working Group on the Universal Periodic Review (Belarus). Belarus examined and supported, among others, the following recommendations:

1) strengthen cooperation between the Government and civil society organizations in promoting and protecting human rights (97.6);

2) examine the possibility of putting in place a national institution for the defence of human rights (97.4);

3) continue cooperation with the United Nations and other international organizations to promote human rights in Belarus (97.9);

4) strengthen its cooperation with the international human rights system (97.12);

5) respect the provisions of the International Covenant on Civil and Political Rights and the Convention against Torture, and the recommendations of intergovernmental human rights mechanisms (97.15);

6) agree on the dates for the visit of eight special mandate holders invited by the Government and engage with other mandate holders, especially with the special rapporteurs on the right to freedom of expression, on human rights defenders and on torture (97.16 – 97.17);

7) ensure fair trials and strictly respect the absolute prohibition of torture, including ensuring that confessions or information obtained as a result of torture and other ill treatment must not be used as evidence (97.28);

8) further improve the living conditions in prisons and pre-trial detention centres [and] review [their] compliance ... with international standards (97.30);

9) ensure that all prisoners or detainees have access to legal counsel and relatives (97.31); and

10) promote human rights education for security and police forces (97.52).

Additionally, the Report contains a number of other recommendations including those concerning changes in the legislation on mass events, court procedures, and registration

24 См. http://www.hrw.org/legacy/no-on-belarus/ga_resolution_61-175.pdf

25 См. Resolution adopted by the General Assembly// 62/169. Situation of human rights in Belarus. http://www.worldlii.org/int/other/UNGARsn/2007/209.pdf

of noncommercial organizations and freedom of speech. It was also recommended to respond to concerns by defence lawyers and nongovernmental organizations regarding trials against human rights defenders and to conform to demands **not to detain political prisoners and not to engage in judicial proceedings for political motives.**[26]

Therefore, it can be emphasized that by the time the court trials against the 19 December 2010 rally participants took place, official Minsk had already supported the Working Group recommendations concerning fair judicial proceedings and had no legal reasons for their non-fulfillment. And it was Belarus' failure to honor its previously undertaken commitments by ignoring them[27] that actually caused the appointment of a new UN Special Rapporteur on the situation in Belarus in 2012.

OSCE. When analyzing the response from the Organization for Security and Cooperation in Europe (OSCE) to the human rights situation in Belarus, one should keep in mind some structural specifics of this international organization[28] (seeking decentralization) and the focus of its mandate concerning Belarus. The main OSCE bodies that keep an eye on the human rights situation in Belarus are: the OSCE Parliamentary Assembly, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) which is mostly involved in election observation[29], the OSCE Representative on Freedom of the Media. Additionally, the OSCE Office in Minsk had also been monitoring the human rights observance in Belarus up to its closure on 31 December 2010. Inter alia, the Office also monitored the court trials against democratic activists in 2009.

The role the ODIHR plays in the assessment of the human rights situation in Belarus is, as a rule, the observation of elections (presidential and parliamentary in 2006/2008 and 2010/2012 respectively) and their evaluation including reasons and grounds for such evaluation. Up to now, the OSCE/ODIHR has never accepted any elections in Belarus. As an example, on 20 March 2006, the OSCE Election Observation Mission to Belarus made a statement noting that the recent presidential elections failed to conform to the OSCE democratic election requirements.[30]

As early as 23 March 2006, the OSCE Chairman-in-Office, Belgian Foreign Minister Karel De Gucht, expressed his deep concern about ongoing arrests, detentions and arbitrary trials of political and public activists following the 19 March 2006 presidential elections in Belarus[31]. Karel De Gucht also informed that the OSCE was aware of a large number of those who were detained and later on faced administrative charges for their participation in the peaceful demonstration. The OSCE Chairman-in-Office also emphasized that the Belarusian authorities refused to disclose information about the detainees. On 28 March 2006 Miklos Haraszti, the OSCE Representative on Freedom of the Media, stated that the

26 See: Report of the Working Group on the Universal Periodic Review (Belarus) dated 21 June 2010 (A/HRC/15/16) http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/145/21/PDF/G1014521.pdf?OpenElement

27 See: Belarus passing UN up http://www.lawtrend.org/ru/content/about/news/belarus-oon-po-puti-ignorirovaniya/ (in Russian)

28 Despite the change in the name from the Conference on Security and Co-operation in Europe to the Organization for Security and Co-operation in Europe, debates are still under way regarding the legal nature of the OSCE. They will probably come to an end as soon as it adopts a binding constitutive charter. From a general point of view, the OSCE is viewed as an international organization.

29 See: ODIHR issues recommendations to improve Belarusian election process in its final report http://www.osce.org/odihr/elections/47402

30 See: INTERNATIONAL ELECTION OBSERVATION MISSION // Presidential Election, Republic of Belarus – 19 March 2006 http://www.osce.org/odihr/elections/belarus/18487

31 See: OSCE Chairman Karel De Gucht concerned over continuous detentions amid post-election developments in Belarus http://www.osce.org/cio/47190

detentions of Belarusian and foreign journalists following the elections contravened the OSCE commitments to providing secure and free coverage of the events.[32] He also requested the authorities to comment on the situation of mass detentions of journalists, both foreign and local, and give grounds for bringing them to administrative liability.

On 27 April 2006, the OSCE Chairman-in-Office Karel De Gucht expressed his deep concern regarding the arrest and custody of an oppositional politician and former presidential candidate, Aleksandr Milinkevich, together with other activists and called for their immediate release.[33] He made a similar call in his letter to the Belarusian President, Aleksandr Lukashenko. It should be noted that OSCE officials, similarly to the UN Special Rapporteur on the human rights situation in Belarus, always tried to figure out the status of a particular political prisoner on a personal basis. In so doing, on 31 October 2006, Ambassador Ake Peterson, Head of the OSCE Office in Minsk, visited Aleksandr Kozulin, a former candidate at the March 2006 presidential elections.[34] And back on 21 September 2006, the OSCE Chairman-in-Office Karel De Gucht expressed his regret that the Belarusian authorities had dismissed Aleksandr Kozulin's appeal and left his harsh sentence unchanged.[35]

In addition to election observation and promotion of protection to journalists, the OSCE, acting through its Representative on Freedom of the Media, monitors changes in the Belarusian mass media legislation. For instance, on 27 June 2008, Miklos Haraszti made a statement, calling on the Parliament to refrain from approving the draft Law on the Mass Media as, in Mr. Haraszti's view, it would hamper the development of new media in the country and would extend powers of the authorities to warn, suspend and close down media outlets. Miklos Haraszti urged the Council of the Republic to return the draft media law to the Chamber of Representatives for further deliberation.[36]

The OSCE Representative on Freedom of the Media also tracked the situation regarding criminal and administrative prosecution of journalists, editors-in-chief and media outlets in Belarus. In so doing, on 18 January 2008, Miklos Haraszti condemned the conviction of Aleksandr Zdvizhkov, former deputy editor-in-chief of the *Zgoda* newspaper, who was sentenced to 3 years in high-security correction facility for reprinting the controversial prophet Muhammad cartoons originally published by a Danish newspaper.[37] Mr. Haraszti also condemned the court decision of 20 December 2007 against the *Novy Chas* newspaper, a small publication that was created and issued by the former *Zgoda* editorial team.[38]

It should be noted that the OSCE Representative on Freedom of the Media has been in close contact with the Ministries of Information and Foreign Affairs, from time to time

32 See: Special Report. Handling of the media during political demonstrations. Observations and Recommendations, 21 June 2007 / http://www.osce.org/fom/25744; The OSCE Representative on Freedom of the Media is worried about treatment of journalists reporting on demonstrations http://democraticbelarus.eu/news/osce-media-freedom-representative-concerned-over-treatment-journalists-covering-demonstrations-

33 CSee: OSCE Chairman condemns today's jailing of Belarusian opposition leader Milinkevich and calls for his immediate release http://democraticbelarus.eu/news/osce-chairman-condemns-todays-jailing-belarusian-opposition-leader-milinkevich-and-calls-his-im

34 See: Jailed Belarus opposition leader visited by OSCE official http://www.osce.org/minsk/47836

35 See: OSCE Chairman seriously regrets sentence against Belarus opposition leader Kozulin upheld during appeal http://democraticbelarus.eu/news/osce-chairman-seriously-regrets-sentence-against-belarus-opposition-leader-kozulin-upheld-durin

36 See: OSCE media freedom representative urges Belarus not to adopt restrictive media law http://www.osce.org/fom/49860

37 See: OSCE media freedom representative protests jailing of editor in Belarus for reprinting cartoons http://www.osce.org/fom/49393

38 See link above.

requesting information about closures of newspapers or adjudications of newspaper publications as extremist.[39]

The OSCE has also repeatedly urged Belarus to abolish the death penalty or impose a moratorium on the execution of death sentences and keeps on tracking information about all executions on an ongoing basis.[40]

Generally, when describing the OSCE response to the human rights situation in Belarus, one can point out its focus on the electoral process and media regulation in Belarus and its considerable interest to the law-making practice.

EUROPEAN UNION. Belarus is neither a member of the European Union (EU) nor has it an effective Partnership and Cooperation Agreement[41](PCA) with the EU as it was not entered into by the EU and its member states due to long-lasting human rights violations in Belarus including those related to the electoral process. This notwithstanding, the EU opened on 7 March 2008 its Belarusian office, the Delegation of the European Union to the Republic of Belarus,[42] following the conclusion of the respective agreement between Belarus and the Commission of the European Communities. It is hardly possible to say that Belarus seeks political integration into the European family. One could rather speak of a quite understandable desire to gain certain economic benefits, which the EU takes into account to a certain extent when selecting the form of response to human rights violations in Belarus. It can also be assumed that as long as Belarus has no formal PCA-based legal relationship with the EU and it has neither associated membership nor EU candidate status, the EU has some extra room for maneuver in selecting sanctions in response to Belarus' human rights violations unlike the UN and OSCE which cannot afford it.

The EU made a prompt response to the human right violations at the time of the 2006 presidential elections. It took form of the Council of the European Union Common Position (2006/276/CFSP) adopted on 10 April 2006. It specified restrictive measures against certain Belarusian officials and repealed Common Position 2004/661/CFSP.[43] Common Position 2006/276/CFSP was a reaction to the failure to meet OSCE requirements of free, fair and democratic elections, and to the arrests of peaceful demonstration participants. According to this Common Position, the EU member states were to take all the necessary measures[44] to prevent the entry into, or transit through, their territories of persons who were responsible for the crackdown on civil society and democratic opposition and for the violations of standards for free and fair elections in Belarus. The lists of such persons were annexed to the Council Common Position. It should be noted that the Common Position contains a number of exemptions from the EU entry or transit ban and that the EU legislation provides the included persons with the right to judicial and extrajudicial appeal. On

39 For more information about all cases see Regular Reports to the Permanent Council: Regular Report to the Permanent Council (2 April 2009) http://www.osce.org/fom/36729 ; Regular Report to the Permanent Council FOM.GAL/5/08/Rev. http://www.osce.org/fom/35131 ; Regular Report to the Permanent Council FOM.GAL/3/09/Rev.1 http://www.osce.org/fom/37876

40 See the Vilnius Declaration adopted by the OSCE Parliamentary Assembly on 3 July 2009.

41 A basic document between the EU and those countries which do not aim to join the EU but are willing to get politically and economically integrated into the "European family." The PCA, as a rule, addresses economic issues (creation of free trade zones), visa matters (withdrawal of consular fees) and political affairs (participation in the EU common policies).

42 See: Role of the EU Delegation http://eeas.europa.eu/delegations/belarus/about_us/delegation_role/index_en.htm

43 COUNCIL COMMON POSITION 2006/276/CFSP of 10 April 2006 concerning restrictive measures against certain officials of Belarus and repealing Common Position 2004/661/CFSP http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:101:0005:0010:EN:PDF

44 Common Position 2006/276/CFSP was implemented by Council Decision (EC) 2006/718/CFSP of 23 October 2006 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:294:0072:0080:EN:PDF

18 May 2006, Common Position 2006/276/CFSP was amended by Common Position 2006/362/CFSP[45] requiring that all EU member states freeze all funds and economic resources of the included persons that appear in the territory of an EU member state.

On 18 May 2006, the Council of the European Union adopted Regulation (EC) No. 765/2006. It specifies certain restrictive measures against President A. Lukashenko and other officials.[46] The proposal for the Regulation was prepared and presented by the Commission of the European Communities as early as 25 March 2006.[47] Regulation 765/2006 reaffirms all of the measures contained in the above-mentioned Council of the European Union Common Positions. On 23 October 2006, the Commission of the European Union adopted its Regulation No.1587/2006 amending Council Regulation 765/2006 by extending the lists of those subjected to the restrictive measures.[48]

All the above-mentioned legal acts were also based on resolutions by the European Parliament adopted both before and after the presidential elections in Belarus[49]. These resolutions specify in particular that the opposition was persecuted throughout the entire electoral process and many opposition leaders were detained and subsequently convicted, noting that the trials they faced were controversial. Cases of multiple detentions of peaceful demonstration participants were also emphasized.

By Regulation 1933/2006 dated 21 December 2006, the EU Council also temporarily withdrew access for Belarus to the EU scheme of generalized tariff preferences.[50] This EU Council's move was caused by violations of the rights of trade unions and of the right to collective bargaining in Belarus.

On 19 March 2007, the EU Council adopted Common Position 2007/173/CFSP[51] renewing the restrictive measures against certain Belarusian officials. According to it, the validity of Common Position 2006/276/CFSP was extended up to 10 April 2008. Common Position 2006/276/CFSP was subsequently further extended until 10 April 2009.[52]

The 2008 parliamentary elections in Belarus including the events in ahead of them (multiple peaceful meetings) were also under a watchful eye of the EU institutions. For instance, on 22 May 2008, the European Parliament adopted a resolution on the arrest of political

45 COUNCIL COMMON POSITION 2006/362/CFSP of 18 May 2006 amending Common Position 2006/276/CFSP concerning restrictive measures against certain officials of Belarus http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:134:0045:0053:EN:PDF

46 COUNCIL REGULATION (EC) No 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:134:0001:0011:EN:PDF

47 COM(2006) 190 final http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0190: FIN:EN:PDF

48 COMMISSION REGULATION (EC) No 1587/2006 of 23 October 2006 amending Council Regulation (EC) No 765/2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:294:0025:0026:EN:PDF

49 European Parliament resolution on the situation in Belarus prior to the presidential elections on

19 March 2006 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:290E:0404:0407:EN:PDF

European Parliament resolution on the situation in Belarus after the presidential elections of 19 March http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2006-0243&language=ET

50 COUNCIL REGULATION (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:405:0035:0040:EN:PDF

51 COUNCIL COMMON POSITION 2007/173/CFSP of 19 March 2007 renewing restrictive measures against certain officials of Belarus http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:079:0040:0040:EN:PDF

52 COUNCIL COMMON POSITION 2008/288/CFSP of 7 April 2008 renewing restrictive measures against certain officials of Belarus http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:095:0066:0066:EN:PDF

opponents in Belarus (P6_TA(2008)0239) where it condemned the use of violence, harsh force and arrests against peaceful demonstration participants, criticized the arrests of a number of opposition and civil-society activists and called on the EU Council and Commission to make proposals to put further pressure on Lukashenko's regime within international organizations.[53] Another European Parliament Resolution, on 21 February 2008, also expressed condemnation regarding the practice of beating and detaining participants of peaceful demonstrations, in particular the series of protests by entrepreneurs and repressions against public organizations (Young Front).[54] On 9 October 2008, the European Parliament adopted a resolution on the situation in Belarus after the 28 September 2008 parliamentary elections.[55] It inter alia urged Belarus to respect human rights, also by making changes to the Criminal Code and the legislation regulating public organizations. As a result, the Council of the European Union adopted another Common Position (2008/844/CFSP)[56], on 10 November 2008 extending Common Position 2006/276/CFSP until 13 October 2009. The latter was subsequently extended until 15 March 2010[57] and until 31 December 2010.[58]

Based on the outcomes of year 2009 which can be regarded as the start of the so-called "liberalization" period before the 2010 presidential elections in Belarus, the European Parliament adopted Resolution P7_TA(2009)0117 of 17 December 2009.[59] This resolution gives grounds to conclude that at that time the EU's attitude towards Belarus was benevolent. The European Parliament inter alia noted the active and constructive participation of Belarus in the Eastern Partnership and urged Belarus to continue to cooperate with the OSCE/ODIHR, in particular in the preparation of a new Electoral Code. It was also stressed that the EU's full re-engagement with Belarus was only possible on the condition that the country would ensure respect for freedom of expression, guarantee freedom of association and peaceful assembly, create favourable conditions for the operation of NGOs, stop prosecutions of those seeking alternative military service and guarantee political rights and freedoms. The European Parliament expressed special regret that no progress had been made in the field of human rights, recalling in this regard the refusal to register certain political parties, independent media and NGOs (Human Rights Center "Viasna").

On 10 March 2010, the European Parliament adopted a resolution on the situation of civil society and national minorities in Belarus.[60] Although the European Parliament welcomed the release of a number of political activists, at the same time, it condemned the police and legal action against the Union of Poles in Belarus (UPB) taken by the Belarusian

53 P6_TA(2008)0239 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:279E:0113:0115:EN:PDF

54 P6_TA(2008)0071 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:184E:0104:0106:EN:PDF

55 European Parliament resolution of 9 October 2008 on the situation in Belarus after the parliamentary elections of 28 September 2008 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0470+0+DOC+XML+V0//EN

56 COUNCIL COMMON POSITION 2008/844/CFSP of 10 November 2008 amending Common Position 2006/276/CFSP concerning restrictive measures against certain officials of Belarus http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:300:0056:0056:EN:PDF

57 COUNCIL COMMON POSITION 2009/314/CFSP of 6 April 2009 amending Common Position 2006/276/CFSP concerning restrictive measures against certain officials of Belarus, and repealing Common Position 2008/844/CFSP http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0021:0022:EN:PDF

58 COUNCIL DECISION 2009/969/CFSP of 15 December 2009 extending the restrictive measures against certain officials of Belarus laid down in Common Position 2006/276/CFSP, and repealing Common Position 2009/314/CFSP http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:332:0076:0076:EN:PDF

59 European Parliament resolution of 17 December 2009 on Belarus http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0117+0+DOC+XML+V0//EN

60 P7_TA(2010)0055 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:349E:0037:0039:EN:PDF

authorities with the aim to change the Polish community leader. On 25 October 2010, the Council of the European Union adopted Decision 2010/639/CFSP[61] concerning restrictive measures against certain officials of Belarus, whereby it changed and complimented the restrictive measures imposed previously. In particular, some officials were removed from the lists and some new temporary grounds to suspend the application of the earlier adopted measures were introduced.

Therefore, it can be concluded that the European Union was quite closely monitoring the human rights situation in Belarus during the period between 2006 and 2010 and promptly reacting to human rights violations. While imposing sanctions on specific individuals, the EU, however, provided for both judicial appeal of these sanctions and, in respective cases, temporary suspension of their application.

COUNCIL OF EUROPE. We believe it possible to say that currently the Council of Europe (CE) is the only international organization, though a regional one, which is truly engaged in the promotion and protection of human rights and makes its impact on the entire global community. Similarly to the EU, the relations between Belarus and the Council of Europe started deteriorating after 1996 when the both organizations refused to accept the results of the referendum, having made a conclusion that it failed to be a free one. The legislative approval of the death penalty and the execution of death sentences only added to that as the both are totally unacceptable to the CE. Nevertheless, the Council of Europe, through its main political bodies (the Parliamentary Assembly — PACE and the Committee of Ministers – CMCE), monitors the human rights situation in Belarus on an ongoing basis, in particular with an aim to assess Belarus' readiness to restore its Special Guest status.

In the period under study (2006-2010), the Parliamentary Assembly of the Council of Europe, similarly to the other above-mentioned international organizations, was especially focused on presidential and parliamentary elections in Belarus. On 26 January 2006, it adopted Resolution 1482 (2006) on the situation in Belarus on the eve of the presidential election,[62] which noted as a matter of extreme concern that in the run-up of the 2006 presidential elections the Lukashenko regime had undertaken a series of measures to prevent any expression of political dissent and obstruct the activities of democratic forces. By this resolution, the PACE urged Belarus to embark resolutely on a path to reforms liable to bring it closer to the Council of Europe standards in the fields of pluralist democracy, human rights and the rule of law as well as to repeal the anti-revolution law.[63] The PACE also called on the EU to apply the visa ban to a greater number of high-rank officials in the Lukashenko regime and freeze their bank accounts.

Following the 2006 presidential elections, the PACE adopted Resolution 1496 (2006),[64] whereby it strongly condemned the undemocratic conduct of the elections and the wave of violence and persecution that took place before, during and after the election and urged Belarus to immediately release all those detained in connection with the March presidential elections, to disclose information about all those who were arrested, detained or received medical treatment after the dispersal of the peaceful demonstrations, to conduct a transparent investigation into the abusive use of force against peaceful demonstrators, to stop further intimidation and persecution of peaceful demonstrators and opposition supporters and to re-run the elections in a free and fair manner. On 27 April 2006 the PACE President, Rene van der Linden, condemned the persecution of opposition politicians including

61 COUNCIL DECISION 2010/639/CFSP of 25 October 2010 concerning restrictive measures against certain officials of Belarus http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0018:0028:EN:PDF

62 Resolution 1482 (2006) http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta06/eres1482.htm

63 This refers to the respective amendments to the Belarusian Criminal Code (introduction of liability for the discrediting of the Republic of Belarus etc.)

64 Resolution 1496 (2006) Belarus in the aftermath of the Presidential election of 19 March 2006 http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=17430&Language=EN

A. Milinkevich.[65] It should be noted that the PACE President made a similar statement as early as 9 March 2006, i.e. in ahead of the presidential election.[66]

As an outcome, the PACE Political Affairs Committee, meeting on 13 February 2007, designated Andrea Rigoni as the PACE Rapporteur on the situation in Belarus.[67] Rigoni actually replaced Adrian Severin, the UN Special Rapporteur on the situation of human rights in Belarus, whose mandate expired in 2007. On 16 March 2007, the PACE President also condemned the arrests in the run-up to Freedom Day (25 March), stressing that he would closely monitor the situation including any further action against the detained activists.[68] He mentioned that those issues would be raised with the speaker of the Belarusian lower chamber of Parliament.

The PACE was also focused on the issue of capital punishment in Belarus. For example, the PACE President and the Rapporteur on the situation in Belarus repeatedly urged to replace the death penalty with a less severe form of punishment and regretted the execution of death sentences.[69] It should be noted that the Rapporteur on the situation in Belarus Andrea Rigoni applied directly to the chairs of the House of Representatives (lower chamber) and the Council of the Republic (upper chamber), Vadim Popov and Gennadiy Novitskiy respectively,[70] urging them to abolish the death penalty. Moreover, the PACE, at its summer session on 22-26 June 2009, voted for the restoration of Special Guest status for Belarus on the condition that it would only institute a moratorium on executions.[71] However, the discussions over the restoration of Special Guest status were virtually nullified by the death sentences to V. Yuzepchuk, A. Burdyko and O. Grishkovets that followed.[72]

Similarly to the OSCE, the PACE paid special attention in 2008 to monitoring the adoption of a new Law on the Mass Media and the situation of the rights of journalists. The PACE Rapporteur on the situation in Belarus Andrea Rigoni urged the Belarusian authorities to refrain from any further examination of the existing draft and to engage in consultations with human rights organizations and civil society over the new Law on the Mass Media.[73] In view of the brutal detentions of journalists during a peaceful demonstration on 25 March 2008, the PACE Rapporteur on the media Andrew Mc-intosh called on Belarus to investi-

65 *PACE President condemns repression of opposition politicians in Belarus http://www.assembly.coe.int/ASP/Press/StopPressView.asp?ID=1764*

66 *PACE President: stop intimidation of the Belarus opposition http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=1816*

67 *Andrea Rigoni designated rapporteur on the situation in Belarus http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=2660*

68 *PACE will closely monitor the situation in Belarus in the run-up to Freedom Day http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=640*

69 *См. PACE President calls to commute the death sentences of three sentenced in Belarus http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3389 ;*

Rene van der Linden appalled by an execution in Belarus http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3399 ; PACE rapporteur Andrea Rigoni condemns executions in Belarus http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3575;

70 *Belarus Rapporteur appeals in the Belarus press for a moratorium on the death penalty http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3697*

71 *Belarus: PACE ready to restore Special Guest status if a moratorium on death penalty is decreed http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4749*

72 *Joint statement on the imminent execution of Vasily Yusepchuk in Belarus http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4997; Belarus: Council of Europe calls for two new death sentences to be commuted http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=5563*

73 *'Draft media law in Belarus should be changed', says PACE rapporteur http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3953*

gate this situation.[74] The PACE Rapporteur on the situation in Belarus Andrea Rigoni also condemned the harsh crackdown on the 25 March peaceful demonstration and noted that, despite the release of six political prisoners, Europe would not be satisfied with mere cosmetic or tactical changes in Belarus.[75]

The criminal justice system in Belarus was also in the focus of close attention by the PACE. For instance, Resolution 1606 (2008) on the abuse of the criminal justice system in Belarus[76] pointed out that the abuses took various forms including:

1) the enactment of the so-called "anti-revolution law";

2) arbitrary convictions of political opponents, following unfair criminal proceedings, under general criminal provisions;

3) politically motivated failure to properly investigate and prosecute criminal acts by state agents against opposition figures;

4) the continued use of the death penalty and particularly cruel practice of secretive gunshot; and

5) the restriction of the right of persons to free movement. The PACE also reminded of the situation around the Human Rights Center "Viasna".

The Parliamentary Assembly urged the Parliament of Belarus as well as judges, prosecutors and police officers to: 1) repeal Law No. 71-3 of 15 December 2005 (the so-called "anti-revolution law") and in particular Article 193-1 of the Criminal Code; 2) urgently introduce a moratorium on executions and abolish the death penalty; and 3) avoid, to the best of one's ability, participating in abuses of the criminal justice system and to bring to bear one's courage and imagination to mitigate the effects of the abusive legislation on its victims. The Assembly also called on Belarusian and international human rights defenders to keep a transparent and objective record of both the victims and the perpetrators of politically motivated abuses of the criminal justice system. Based on PACE Resolution 1606 (2008), Recommendation 1832 (2008),[77] was adopted, whereby the Assembly invited the CE Committee of Ministers to take a number of specific actions to implement Resolution 1606 (2008).

The PACE assessment of the human rights situation in Belarus in 2009 is given in its Resolution 1671 (2009).[78] Among positive moments, the Assembly noted the release of six political prisoners including former presidential candidate A. Kozulin, the possibility for independent newspapers, *Nasha Niva*, *Narodnaya Volya* and *Uzgorak*, to be published in Belarus and their inclusion in the state distribution network as well as the setting up of a consultative council under the aegis of the Presidential Administration. At the same time, the PACE stressed that the 2008 parliamentary elections failed to meet the OSCE criteria of fairness and freedom. The Assembly did not also left unattended the multiple occasions of persecuting opposition activists including arrests and searches of private houses, detentions at the time of peaceful assembly, the arrest of three entrepreneurs and the absolute governmental control of the mass media. The Assembly also regretted that capital executions could be still carried out in Belarus. Resolution 1671 (2009) contains a number

74 PACE rapporteur calls for investigations into police brutality against journalists in Minsk http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3757

75 PACE rapporteur: sentences against young demonstrators in Belarus are 'harsh and unjustified' http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3777

76 RESOLUTION 1606 (2008) on the abuse of the criminal justice system in Belarus http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileId=17637&Language=EN

77 RECOMMENDATION 1832 (2008) on the abuse of the criminal justice system in Belarus http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/EREC1832.htm

78 Resolution 1671 (2009) Situation in Belarus http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=17749&Language=EN

of practical demands to make changes to the Belarusian (constitutional, administrative and criminal) legislation and to put an end to the persecutions of activists and political opponents.[79]

Assessing the human rights situation in Belarus in 2010, the PACE pointed out in its Resolution 1727 (2010), Situation in Belarus: Recent Developments[80] that the developments in Belarus at that time showed lack of progress towards Council of Europe standards and lack of political will on the part of the Belarusian authorities to embrace Council of Europe values and to make progress towards Council of Europe standards. The Assembly decided to suspend its activities involving high-level contacts between the Assembly and the Parliament and/or governmental authorities of Belarus. At the same time, the PACE kept on monitoring the human rights situation in Belarus. In particular, the Council of Europe closely followed the commencement and course of the electoral campaign in the run-up to the presidential election of 19 December 2010.

In so doing, the CE Venice Commission together the OSCE/ODIHR carried out an assessment of changes made to the Electoral Code of the Republic of Belarus.[81] Sinikka Hurskainen, the PACE Rapporteur on the situation in Belarus, visited Minsk from 23 to 25 August 2010 where she met with both the opposition and high-rank officials of Belarus.[82]

At a special meeting on 18 November 2010, the PACE urged Belarus to demonstrate visible progress in the conduct of the forthcoming presidential elections, in particular with regard to the freedom of the media.[83] On 9 December 2010 European parliamentarians Sinikka Hurskainen and Jacek Protasiewicz called on the Belarusian authorities to conduct free and fair elections, noting at the same time a number of positive moments in the electoral process.[84]

Conclusions:

1) Within the time period under study, those international organizations that are involved in the promotion and protection of human rights were closely monitoring the situation of human rights in Belarus and promptly responding to occurring violations;
2) The situation in Belarus was monitored within the entire period under study, in particular by special rapporteurs on the situation in Belarus (UN and CE);
3) The responses to human rights violations took various forms: adoption of resolutions and recommendations, introduction of the (special) rapporteur mechanism on the situation in Belarus (UN and CE) and the introduction of sanctions (visa bans and financial restrictions) against officials responsible for human rights violations.

79 Based on Resolution 1671 (2009), the PACE adopted Recommendation 1874 (2009) on the situation in Belarus whereby specifying recommendations to the CE Committee of Ministers. See Recommendation 1874 (2009) Situation in Belarus http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=17750&Language=EN

80 RESOLUTION 1727 (2010) Situation in Belarus: recent developments. http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1727.htm

81 'Dialogue with the Belarusian authorities does not mean refraining from criticism' http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=5373

82 PACE rapporteur on the situation in Belarus to visit Minsk http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=5827

83 PACE Committee calls for visible progress in the conduct of Presidential elections in Belarus http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6091

84 Parliamentary statement on the forthcoming presidential elections in Belarus http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6173

2.3. Political and Legal Background before the December Events (2010)

The year 2010 started with the local elections and ended with the election of the President of Belarus. The time period in ahead of 19 December 2010 was marked by a plentiful of human rights violations, especially in the field of freedom of association and assembly, freedom of the media, fair justice and other rights and freedoms.[85] As an example, there had been a series of ongoing arbitrary detentions among activists of various, mostly unregistered, civic campaigns and organizations starting January 2010. The bulk of the persecution was experienced by activists of the Young Front, an NGO registered in the Czech Republic, Young Belarus, a public campaign, European Belarus, a civic campaign, Tell the Truth!, etc. The persecution of activists, as a rule, took the following two forms: detention by unknown people and transportation in an unknown vehicle to an unknown location or detention eventually resulting in an administrative indictment and further trial. Activists, as a rule, faced administrative charges of either petty hooliganism (Article 17.1 of the Code of Administrative Offences of the Republic of Belarus) or of refusal to obey lawful commands or demands of an officer on duty (Article 23.4, Code of Administrative Offences). As for organizing committees wishing to establish a political party,[86] public campaigns[87] or unregistered public organizations,[88] their position deteriorated even further as justice departments of local authorities refused to register them, while courts[89] dismissed their complaints of illegal actions by justice departments. It was all happening against the background of Article 193–1 of the Criminal Code stipulating criminal liability for actions on behalf of an unregistered public organization.[90]

Cases of criminal prosecution against political and public activists occurred throughout 2010: V. Tsynkevich,[91] D. Dashkevich,[92] E. Lobov, S. Kovalenko,[93] N. Dedok and A. Frantskevich[94] were brought to criminal liability under Article 339 of the Criminal Code (grave hooliganism); I. Mihailov and Ye. Yakovenko, having failed to demand that their conscription be replaced by alternative civil service, were convicted under Article 435 of the Criminal Code; A. Avtuhovich was sentenced by the Supreme Court under Article 295, Part 3 of the Criminal Code (storage of firearms and ammunition).

Similarly, some independent media and journalists experienced pressure on the part of the Ministry of Information. The ministry refused to register several regional print media outlets, such as *Mogiliovskiy Chas* and *Silniye Novosti Gomelya*. The independent newspapers *Narodnaya Volya*, *Novy Chas* and *Tovarishch* received official warnings from the Ministry of Information. The Belarusian Association of Journalists was also warned. The

85 Section 2.3 is based on the Chronicled Outlooks of Human Rights Violations in Belarus for 2010 authored by the Human Rights Center "Viasna." For more information, see www.spring96.org/en/publications

86 The organizing committee to establish the political party Belarusian Christian Democracy and the Belarusian Worker's Party.

87 E.g. Tell the Truth!

88 Registration was denied, in particular, to the founders of the public human rights defending organization Brestskaya Vesna. The Young Front was denied registration as well.

89 Brest Regional Court and the Supreme Court.

90 On 11 February 2010, I. Stasiuk, a Young Front member, received a prosecutor's warning reminding him of the liability for violations of Article 193-1 of the Criminal Code. On 18 February, a similar warning from the Prosecutor of Grodno was issued to A. Kirkevich, deputy head of the Young Front.

91 Sentenced to pay a fine of 250 basic fee units (1 BFU = Br100,000) for spilling Brilliant Green onto a monument of Lenin.

92 D. Dashkevich and E. Lobov were detained on 18 December 2010.

93 Sentenced for mounting a white-red-white flag onto the New Year fir-tree in a city square.

94 Both were convicted for attacking the Russian Embassy in Minsk.

rights of journalists were often restricted. For example, Marina Koktysh was refused to be accredited by the House of Representatives (lower chamber of Parliament) and by Slutsk District Executive Committee (local government body). A significant number of activists and media staff received administrative sentences for distributing stickers, leaflets and newspapers or transporting them in a vehicle.[95] Moreover, repeated searches of mass media offices and private homes of journalists took place throughout 2010. As a result, computer equipment used for professional activity was often seized under fictitious grounds — allegedly for the purpose of a criminal investigation.

The authorities also committed violations of the right to peaceful assembly and freedom of association: executive committees repeatedly refused to issue permits to authorize the conduct of mass events.[96] Meanwhile, the courts ruled in favour of the executive committees in all such cases.[97] The activists who distributed leaflets and newspapers faced administrative charges of both distributing print media without data-lines and violating the regulations governing the organization and conduct of picketing. In 2010, not a single opposition-oriented NGO or human rights organization, political party or civil campaign had a chance to register; because of that members of the above ran a risk of being charged under Article 193-1 of the Criminal Code if they would not discontinue their activity.[98]

2.4. Events that Served as a Pretext for Criminal Prosecution

The criminal prosecution examined in this study was grounded on the events that took place on 19 December 2010 after 8 PM in Minsk. As of today, there are two strictly antipodal points of view on what happened on the evening of 19 December 2010. The authorities' official version, as stated in the court sentences, is that those were mass disorders and actions gravely violating public order suppressed by the police in accordance with the law. The second version is an unofficial one which is supported by the opposition, NGOs, foreign countries and international organizations. According to it, a peaceful rally took place on that evening, while an insignificant number of those present committed violent actions against the property of the House of Government. This version also points out that the police used disproportionate force against all participants in spite of the fact that the overwhelming majority of those gathered neither supported nor took part in any acts of aggression. For the purposes of this study, we will give a general outlook of what did happen, based on what was both documented by NGO[99], international organizations[100], and human rights defenders[101] and reported in the media[102].

Everybody including the President of Belarus,[103] and, therefore, the law enforcement

95 E.g. A. Romanovich and K. Shatikova received administrative sentences for distributing print products with no data-line. Editor-in-chief of Vitebskiy Courier was convicted of committing an administrative offence for illegal distribution of the print media found inside his car.

96 Except for the traditional Chernobyl Way.

97 On 7 May 2010, participants of an unauthorized picketing to commemorate Yury Zaharenko, the disappeared ex-Minister of the Interior, were administratively tried and convicted. An LGBT street procession was cracked down. On 26 June in Gomel, participants of an event devoted to the 20th anniversary of the Belarusian Declaration of State Sovereignty were detained.

98 For instance, on 20 August the Brest Regional Department of Justice issued a repeated registration denial for the 10th time.

99 FINAL ASSESSMENT of the 19 December 2010 events in Minsk, Belarus, in terms of human rights // http://hrwatch-by.org/sites/default/files/Final_HRights_Assessment_of_19-12-2010_in_Minsk-rus_final.pdf

100 See pages 23-24 of the Final Report, OSCE/ODIHR Election Observation Mission // http://www.osce.org/odihr/elections/75713

101 Review-Chronicle of Human Rights Violations in Belarus, December 2010 // http://spring96.org/en/news/40637

102 См. Naviny.by, nn.by, belta.by

103 See: Lukashenko: We knew about the preparation of provocations http://naviny.by/rubrics/elections/2010/12/20/ic_news_623_357714/ (in Russian); Lukashenko: There won't be anyone in the square today http://naviny.by/rubrics/elections/2010/12/19/ic_media_video_623_5102/ (in Russian)

agencies, were well aware that the opposition had planned to hold a meeting on 19 December 2010 at 8 PM in October Square. The respective information had been repeatedly announced by presidential candidates and their proxies during debates,[104] press conferences,[105] and interviews as well as by other means. It should be noted that some presidential candidates applied to the Ministry of the Interior and the KGB with a proposal to hold a meeting and agree on the security issues regarding the 19 December 2010 meeting. The proposal was dismissed on the pretext that it was impossible to discuss such matters as the planned event had not been authorized.[106] Despite Lukashenko's assuring statements that nobody would come to the Square,[107] several large-size police vehicles for transporting detainees, buses with the Special Purpose Police Regiment staff and other police vehicles were parked in the close vicinity of October Square several hours in advance of the meeting time.[108]

Many members of the opposition and youth activists were preventively detained in the afternoon of 19 December or earlier. Some of them were arrested under administrative charges[109] for a term preventing them from taking part in the 19 December meeting. Judging by what was stated by presidential candidates, they had no common understanding of how the meeting would proceed. At the same time, its peaceful nature and direct connection to the voting results was expressly emphasized.

The first half of the Election Day went on as normal routine with nothing out of the ordinary.[110] Some presidential candidates, while at their electoral precincts, spoke of the planned meeting and expressed their attitude to it.[111] In the afternoon, some presidential candidates visited the office of the Belarusian Prosecutor General, G. A. Vasilevich, where they lodged a complaint regarding the disappearance of D. Dashkevich and E. Lobov, members of the Young Front, who appeared to be detained on 18 December and later brought to criminal liability under Article 339 of the Criminal Code.[112]

The supporters of presidential candidates gathered in three basic ways: a column of people headed by V. Rymashevskiy and V. Severinets along with Young Front members moved to October Square from the railway station en route Railway Station Square — Kirova Street — Independence Avenue. The second column, V. Nekliaev supporters, moved

104 See: TV debates unite alternative candidates to shoot daylight out of BTV and Lukashenko (video) // http://newsby.org/by/2010/12/05/text17256.htm (in Russian)

105 See: Sannikov: If they say Lukashenko won, we will protest http://naviny.by/rubrics/elections/2010/12/19/ic_media_video_623_5094/ (in Russian)

106 See page 6, FINAL ASSESSMENT of the 19 December 2010 events in Minsk, Belarus, in terms of human rights // http://hrwatch-by.org/sites/default/files/Final_HRights_Assessment_of_19-12-2010_in_Minsk-eng_final.pdf

107 See: Lukashenko: There won't be anyone in the square today http://naviny.by/rubrics/elections/2010/12/19/ic_media_video_623_5102 / (in Russian)

108 See: All quiet in Minsk // http://nn.by/?c=ar&i=47552 (in Belarusian); Law enforcers troop in Minsk center // http://nn.by/?c=ar&i=47565 (in Belarusian)

109 See: Candidate Rymashevskiy's proxy barred in detention center until trial http://naviny.by/rubrics/elections/2010/12/19/ic_news_623_357509/ (in Russian); Candidate Statkevich's proxy detained in Gomel for 'cussing' // http://naviny.by/rubrics/elections/2010/12/19/ic_news_623_357520/ (in Russian); Second Nikolay Statkevich's election headquarters member detained // http://naviny.by/rubrics/elections/2010/12/19/ic_news_623_357533/ (in Russian); Police detain Vladimir Nekliaev's proxy http://naviny.by/rubrics/elections/2010/12/19/ic_news_623_357535/ (in Russian); List of young boys and girls in custody // http://nn.by/?c=ar&i=47526 (in Belarusian)

110 See: All quiet in Minsk // http://nn.by/?c=ar&i=47552 (in Belarusian)

111 See: Sannikov: If they say Lukashenko won, we will protest http://naviny.by/rubrics/elections/2010/12/19/ic_media_video_623_5094/ (in Russian); The Square left without sound amplifiers? // http://nn.by/?c=ar&i=47555 (in Belarusian); Rymashevskiy: The Square's primary slogan is 'We are one people' // http://nn.by/?c=ar&i=47518 (in Belarusian)

112 See: Five presidential candidates near Prosecutor's Office // http://nn.by/?c=ar&i=47557 (in Belarusian)

to the meeting venue along Nemiga Street. Presidential candidate N. Statkevich who had come to Nekliaev's head office to discuss a number of matters joined V. Nekliaev's supporters.[113] At approx. 7:20 PM the column was halted by the traffic police and shortly afterwards V. Nekliaev and his supporters were attacked by unknown people who used harsh force together with noise-making and pyrotechnical devices. As a result, almost all those in the column (including journalists) regardless of their gender were knocked off their feet, some severely beaten including journalists and V. Nekliaev. The latter's condition required calling an ambulance.[114] V. Nekliaev was taken to the Emergency Hospital and shortly afterwards he was forced to leave it by KGB officials and taken to the pre-trial detention center.[115] The sound-amplifying equipment in the minibus that accompanied V. Nekliaev's supporters was seized.[116] Nevertheless, the supporters of V. Nekliaev together with N. Statkevich and journalists managed to get to October Square where they informed about the attack on V. Nekliaev.[117]

In parallel, the Ministry of the Interior distributed a report through the state-run television channels insisting that it had prevented an attempt to deliver to October Square, allegedly by the same minibus, objects intended to cause injuries or property damage, including reinforcement bars, bottles with explosives and wooden truncheons.[118]

Other presidential candidates and participants of the meeting arrived directly to October Square a little earlier than 8 PM. According to varying estimates, 10 to 15 thousand meeting participants gathered in the square.[119] Despite widespread announcements of the planned meeting, the square had been turned into a skating rink, and there were people skating on it. Very loud music was playing, and because of that any speeches by presidential candidates or their proxies could not be heard clearly.[120] Closer to 8 PM, the public transport ceased to make stops in the vicinity of October Square; private cars had to park at a considerable distance.[121] From approx. 7:40 PM and on, metro trains had ceased to stop at "October Square". Any access to the station itself and to the neighbouring Kupalovskaya station was banned about 8:40 PM.

At approx. 8:50 PM the meeting participants, having formed a column, started moving along Independence Avenue towards Independence Square. On the move, a meeting participant took off a national flag flying at the KGB building entrance and replaced it with a white-red-white one. The column reached Independence Square about 9:20 PM and spread between the buildings of Minsk City Executive Committee and the House of Government.

113 See: Square 2010: Online Report // http://naviny.by/rubrics/elections/2010/12/19/ic_articles_623_171731/ (in Russian); Column moving from Nekliaev's office // http://nn.by/?c=ar&i=47574 (in Belarusian)

114 See: Unknown seize sound amplifiers, knocked-out Nekliaev loose consciousness // http://nn.by/?c=ar&i=47576 (in Belarusian)

115 See: V. Nekliaev brought to hospital with head injury. 2nd article: "Discharged" by force on 20 December night about 1:30 AM. See: Nekliaev hospitalized with mild traumatic brain injury // http://nn.by/?c=ar&i=47594 (in Belarusian)

116 See: Unknown seize sound amplifiers, knocked-out Nekliaev loose consciousness // http://nn.by/?c=ar&i=47576 (in Belarusian)

117 See: Square 2010: Online Report // http://naviny.by/rubrics/elections/2010/12/19/ic_articles_623_171731/ (in Russian)

118 See: SWAT beat Nekliaev and his followers // http://naviny.by/rubrics/elections/2010/12/19/ic_articles_623_171733/ (in Russian); Also repeated reports about explosives. See: Interior Ministry: Two buses with explosives captured in Minsk // http://naviny.by/rubrics/elections/2010/12/19/ic_news_623_357633/ (in Russian)

119 Surely, nobody knows it precisely. See: Square 2010 Photo Report // http://naviny.by/rubrics/elections/2010/12/19/ic_media_photo_623_4519/ (in Russian)

120 See: Sound equipment brought to Square, sound volume weak // http://nn.by/?c=ar&i=47591 (in Belarusian)

121 See: Traffic police prevent private cars from parking at October Square // http://nn.by/?c=ar&i=47569 (in Belarusian)

Presidential candidates delivered speeches on various topics, addressing, above all, the election results, exit-poll results and the issue of "forming a group authorized to engage in negotiations with the Government about the conduct of new presidential elections without Aleksandr Lukashenko's participation."[122]

At approx. 10 PM, several people broke a few window-panes in the House of Government and in some time started breaking the entrance doors. A group of demonstrators made an attempt to stop them, though to no effect. Along with that, the rally participants urged each other not to fall for the provocation and to refrain from taking part in the disorder.[123] After that a unit of the Special Purpose Police Regiment pushed those who were breaking doors and windows off. As a result, a number of meting participants including those who abstained from attacking the House of Government were hurt and injured.[124] Furthermore, some people, allegedly from among the participants of the rally, made another attempt to break in the House of Government. Again, the special purpose police unit pushed them off the doors. After that, the police started splitting the demonstrators into separate groups and pushing them farther off the House of Government. There had been an agreement reached between the presidential candidates (V. Rymashevskiy) and the police superiors that the police would let the demonstrators leave Independence Square. But, on the contrary, by the time the negotiations were over, special police transportation vehicles had arrived and mass detentions of the demonstrators kicked off. The crackdown on the rally was accompanied by detentions of its participants and stopped at approx. 00:15 AM when there were almost no demonstrators left in Independence Square.[125] Most of the rally participants escaped detentions and left in the direction of Nemiga Street and October Square.

The events of the 19 December 2010 evening and night resulted in administrative sentences to 639 people.[126] . At the same time, the Ministry of the Interior refused to disclose to the OSCE Election Observation Mission any information about those detained. Also, 41 persons were detained under criminal charges, including almost all presidential candidates.[127] During the crackdown on the rally, many journalists were beaten and subjected to administrative arrest, while their equipment was damaged or broken.[128] Human rights defenders were administratively prosecuted as well.[129]

2.5. Formation of the Public Opinion by State-run Media at the Pre-trial and Trial Phases

As generally accepted, it is extremely important that the accused are presumed innocent throughout the phases of pre-trial investigation into the criminal case and subsequent

122 See: Presidential race chronicles: opposition defeated http://naviny.by/rubrics/elections/2010/12/20/ic_articles_623_171745 (in Russian

123 See: Square 2010: Online Report // http://naviny.by/rubrics/elections/2010/12/19/ic_articles_623_171731/ (in Russian)

124 See link above and: Rymashevskiy injured at rally// http://naviny.by/rubrics/elections/2010/12/19/ic_news_623_357649/ (in Russian)

125 See: Square 2010: Online Report // http://naviny.by/rubrics/elections/2010/12/19/ic_articles_623_171731/ (in Russian)

126 The overwhelming majority of the detained later received administrative sentences

127 See page 24, Final Report of the OSCE/ODIHR Election Observation Mission // http://www.osce.org/odihr/elections/75713

128 See: Police refuse to apologize for beating journalists on 19 December // http://naviny.by/rubrics/society/2010/12/23/ic_media_video_116_5138/ (in Russian); BAJ urges interior and justice ministries to restore justice regarding journalists // http://naviny.by/rubrics/society/2010/12/24/ic_news_116_358070/ (in Russian)

129 See: Hundreds of opposition followers detained in Minsk http://naviny.by/rubrics/elections/2010/12/20/ic_news_623_357685/ (in Russian)

court hearings.[130] The responsibility to secure the presumption of innocence lies first of all with both the state agencies (pre-trial investigation bodies, prosecution authorities, the judiciary and the executive) and the media.[131] At the same time, as noted by the UN Human Rights Committee in sub-clause 10.6 of the Communications on the *Marinich vs. Belarus case*[132] dated 16 July 2010, *"the fact that, in the context of this case,*[133] *the State media portrayed the author as guilty before trial is in itself a violation of article 14, paragraph 2, of the Covenant."*

It is no less important that the media should observe certain ethical rules to avoid possible impact of extralegal factors on pre-trial investigators, prosecutors and judges. It should be also taken into account that, depending on the way a criminal process is covered in the mass media reports, a respective public opinion is formed, which may lead to different results. On the one hand, the public may demand punishment or express indifference towards the accused, thus giving a *carte blanche*[134] to those high-ranking politicians who formally are not part of the state institutes of law[135] but have leverages to influence criminal and procedural decision-making. On the other hand, depending on the attitude insofar shaped towards a criminal case, the country's population may exert certain influence on the case, causing changes in the criminal and procedural status or position of the accused.[136]

Having analyzed the essence and methods of the media coverage related to the criminal prosecution of those detained during and after the events of the 19 December 2010 evening, one can arrive at the following conclusions. In the immediate course of the events, those nongovernmental media that have websites were most promptly covering them, complimenting their reports with photos, audio and video,[137] awhile the state-run media generally limited their reports to the final phase of the rally in Independence Square with a primary focus on the "pogrom"[138] of the House of Government and disorderly actions in front of it. However, starting 20 December 2010, the state-run mass media became a

130 *The presumption of innocence is set forth in Article 26 of the Constitution of the Republic of Belarus, Article 14(2) of the International Covenant on Civil and Political Rights and Article 16 of the Code of Criminal Procedures of the Republic of Belarus.*

132 *The question of whether the requirement to observe the presumption of innocence applies to the mass media as well gives rise to much controversy nowadays; and the respective judicial practice is as controversial, too, except for the cases where information about the accused is distributed by a state-run mass medium (e.g. a state television channel or large-circulation newspaper) or where an outlet, though independent, reports on the basis of criminal case records received from the authorities.*

132 *CCPR/C/99/D/1502/2006 // http://www1.umn.edu/humanrts/russian/hrcommittee/Rview1502sess99.html*

133 *"Some episodes of the interrogation were broadcasted on Belarusian TV accompanied with false and degrading comments about the author suggesting that he was guilty. He submitted that the State-controlled Belarusian TV aired the distorted information even before the investigation ended." See sub-clause 10.6 of the Communications on the Marinich vs. Belarus case / CCPR/C/99/D/1502/2006*

134 *To raise one's rating and win the electorate's support.*

135 *There are almost no such politicians among high-rank state officials. For instance, most of the presidents in the CIS countries enjoy broad powers to control the employment policies in bodies in charge of prosecution, investigation and interrogation bodies as well as in the national security agencies and courts. Moreover, many of these presidents have the discretional right to pardon*

136 *According to Articles 121 and 123 through 124 of the Belarusian Code of Criminal Procedures, individuals who are not relatives and/or family members of the accused, may apply for such measures of pre-trial restraint as personal warranty or care of a minor or bail. All these pre-trial restraint measures are much softer than custody at a pre-trial or temporary detention center.*

137 *See: "As for the work of some non-state mass media, the Ministry of Information is seriously dissatisfied with their activities in that period… In our view, such publications share a significant part of the blame for the mass disorders that took place in Independence Square on 19 December," [the minister of information] Oleg Proleskovskiy said and added: "That is why the Ministry will thoroughly analyze and give a legal assessment of the actions by such media outlets." http://respublika.info/5163/mass-media/article44563/ (in Russian)*

138 *An example of the language used by presenters at state-run TV channels.*

predominant source of information. The reports and comments regarding those detained, suspected or charged were made not only by professional journalists and officials (of criminal prosecution authorities and executive bodies) but also by prominent figures in science and culture, sportsmen, former presidential candidates[139] and ordinary Minsk residents. In its essence, the information about the criminal prosecution disseminated by the state-run mass media was based on either the materials received from pre-trial investigation or search and detection bodies, or obtained in their own right as authorized by the above[140] or obtained on 19 December 2010 when filming the events.[141]

As for the first hours after the disorderly actions occurred in front of the House of Government, the state-owned television channels were quite reserved in their comments with a larger focus on video footage, though quite short in length. A presenter of the Belarus Channel dubbed the happenings as a "pogrom" in the Central Election Commission building and referred to the meeting participants as a "furious mob."[142] The STV Channel aired a news item (19.12.2010 23:12) about the disorders in Independence Square. It was reported that "people have gathered near the House of Government behaving aggressively and smashing glass panes in the building." It was also reported that a BELTA (the state-run Belarusian Telegraph Agency) correspondent was allegedly beaten up by the crowd. When interviewed, Nikolay Lozovik, Secretary of the Central Election Commission, said that *"a large crowd of really rowdy roughnecks is trying to crack on something but not in the way the inspirers of this meeting had declared — a peaceful way — but are turning to breaking doors and crashing windows."*[143] Notably, the STV video footage shows only a small group of "attackers" surrounded by journalists.

20 December 2010 turned into a day of statements and comments by BELTA. Officials of the Ministry of the Interior told BELTA that "*the overwhelming majority* [of the most aggressive offenders] *were the unemployed and students of various educational institutions (including minors) under alcoholic intoxication.*" Also, a BELTA report insisted that *"on 19 December, aggressively disposed people attempted to destabilize the situation in the city during the presidential elections"* and *"as a result, what at the first sight seemed to be a peaceful meeting grew into an attempt to storm into the building of the Council of Ministers"…* and *"having broken several window-panes, the perpetrators find their way into the building."*[144] Professor Mihail Finberg, a People's Artist of Belarus and a laureate of the State Prize of Belarus and the Belarus and Russia Union State Prize in the field of literature and art, expressed the following point of view: *"The meeting in October Square and the attempt to seize the House of Government is a breach of the Constitution, a breach of all possible regulations existing in the city and country."*[145] Nikolay Cherginets, chairman of the Writers Union of Belarus and chairman of the Public Morals Council, told BELTA that the presidential candidates' actions were identical to the organization of mass disorders and further noted that *"the oppositionists tasked themselves to stage a pogrom. It's*

139 Several such statements will be addressed later in more detail.

140 KE.g. by interviewing detained participants of the events.

141 A lesser part.

142 See: Channel One: A furious mob led a pogrom in the CEC building http://naviny.by/rubrics/elections/2010/12/20/ic_media_video_623_5109/ (in Russian)

143 See: Participants of a mass unsanctioned action kicked up disorders near the House of Government in Minsk // http://www.ctv.by/ (in Russian)

144 See: Drunk idlers and students active at opposition move in Minsk // http://www.belta.by/ru/all_news/society/Aktivnymi-uchastnikami-aktsii-oppozitsii-v-Minske-byli-naxodivshiesja-v-sostojanii-opjanenija-bezrabotnye-i-uchaschiesja_i_536504.html (in Russian)

145 See: Finberg: Evening events on 19 December in Minsk breach all possible regulations in city and country // http://www.belta.by/ru/all_news/society/Finberg-sobytija-v-Minske-vecherom-19-dekabrja---narushenie-vsex-porjadkov-suschestvujuschix-v-gorode-i-strane_i_536462.html (in Russian)

evidenced by the detained minibuses with explosives, beating clubs, reinforcement bars and gas containers.”[146]

Former presidential candidate V. Tereshchenko said that many candidates and their proxies (including V. Nekliaev and A. Lebedko) at a gathering in Vitaly Rymashevskiy's election headquarters 9 to 10 days prior to the elections seriously considered a possible assault on governmental buildings, TV and radio. Tereshchenko alleged to have seen emotionally "aroused" young people including drunken ones in October Square. The politician stated that *"the disorders were arranged to destabilize the situation and insult Belarus in the international context."*[147] Ex-candidate for presidency Yaroslav Romanchuk also made a statement, swiftly reading it in front of the cameras, whereby condemning a number of presidential candidates and their relatives who *"instigated the disorders and committed an attempt to seize the building of the House of Government."*[148] Later Romanchuk announced that the statement was delivered under pressure and that he had no choice in those circumstances. Ya. Romanchuk denounced that statement and apologized[149] at those court hearings where he appeared as a witness. A. Surikov, the Russian Ambassador to Belarus, said that the presidential candidates should not have got inside the Parliament building at night as that constituted a seizure of a government body.[150]

Later on, a chronicle of the 19 December events appeared on BELTA's website. Among other things, it contained the information about the detained minibus with explosives and about calls *"to those gathered to attack the said building with a subsequent coup d'etat and seizure of power."*[151] Quite a lot of comments on the 19 December events, in various forms and on numerous occasions, were made by Vadim Gigin, a journalist, political analyst, secretary of the Belarusian Union of Journalists and the editor-in-chief of the *Belaruskaya Dumka* magazine. As he stressed, that could be either an attempted *coup d'etat* or its imitation to clear themselves in the eyes of foreign sponsors.[152] V. Gigin also addressed the topic of 19 December in his blog on BELTA's website.[153] One of his posts,[154] NO PASARAN![155] expressly declares that the mass disorders were *"nothing but an attempted coup d'etat."*

Surely, a blog is not a mass media by law and, of course, V. Gigin has all the right to

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146 See: Participants of unsanctioned action in Minsk must stand trial, says Cherginets // http://www.belta.by/ru/all_news/society/Uchastniki-nesanktsionirovannoj-aktsii-v-Minske-dolzhny-otvetit-za-svoi-dejstvija-po-zakonu---Cherginets_i_536520.html (in Russian)

147 See: Tereshchenko: Some presidential candidates willfully prepare to attack government buildings // http://www.belta.by/ru/all_news/society/Tereschenko-Rjad-kandidatov-v-prezidenty-Belarusi-umyshlenno-gotovilis-k-shturmu-pravitelstvennyx-zdanij_i_536442.html (in Russian)

148 See: 19 December evening events in Minsk reflect culpable immaturity of many politicians, says Romanchuk // http://www.belta.by/ru/all_news/politics/Sobytija-v-Minske-vecherom-19-dekabrja-javljajutsja-projavleniem-prestupnoj-nezrelosti-tselogo-rjada-politikov---Romanchuk-VIDEO_i_536432.html (in Russian)

149 See: Yaroslav Romanchuk's weird 'I'm sorry" to Irina Halip // http://beltribunal.nl/novosti/yaroslav-romanchuk-svoeobrazno-izvinilsya-pered-irinoi-khalip-skazav (in Russian); Romanchuk repents and leaves UCP // http://www.moyby.com/news/55788/ (in Russian)

150 See: Instigators of 19 December disorders in Minsk must face the Belarusian law // http://www.belta.by/ru/all_news/society/Zachinschiki-besporjadkov-v-Minske-19-dekabrja-dolzhny-otvechat-za-svoi-dejstvija-po-belorusskim-zakonam-_i_537042.html (in Russian)

151 See: Police to examine photos and videos on 19 December disorders in media and on websites // http://www.belta.by/ru/all_news/society/Militsija-izuchit-foto--i-videomaterialy-SMI-i-internet-sajtov-po-besporjadkam-19-dekabrja_i_536898.html (in Russian)

152 See: Square 2010 organized worse than in 2001 and 2006, says Gigin // http://www.belta.by/ru/all_news/society/Ploshcha-2010-byla-organizovana-xuzhe-analogichnyx-aktsij-2001-i-2006-godov---Gigin_i_538880.html (in Russian)

153 Some blog posts were later reposted on the Belarusian Union of Journalists website

154 In essence, it is a full-fledged article.

155 See: NO PASARAN! // http://buj.by/2011/01/%C2%A1no-pasaran/ (in Russian)

express his personal, private opinions. At the same time, it should be kept in mind that his blog is located on the website belonging to a major information agency with a duplicate on the site of the Belarusian Union of Journalists, of which V. Gigin is secretary. That is, the blog's location gives way to broad opportunities: 1) to be a source of information as equal as other BELTA news and 2) to disseminate information among other BUJ members.

Similarly, the topic of the 19 December events was addressed in a number of articles in the *Belaruskaya Dumka* magazine.[156] For instance, an article by V. Makarov,[157] Aleksandr Lukashenko's Revolution, was published in the February 2011 issue. The article in particular insists that the failed ***"attempt of coup d'etat"*** on the night between 19 and 20 December 2010 in Minsk clearly demonstrated that ***"violent actions create a general background and at the first stage are appealing to the public, attracting loads of participants," "but already at the preliminary stage of preparing for a revolution, a "tough" militant group is created which, at the decisive moment, must commit violent actions (armed or unarmed depending on the circumstances)."***[158] The author also gave his account of the 19 December 2010 events: ***"A liberoid (in fact, antidemocratic) counterrevolutionary coup d'etat was once again disrupted in the Republic of Belarus."***[159] The magazine's March 2011 issue includes an article by the then KGB head Vadim Zaytsev, Geopolitical Challenge to the Mankind. In his observations that address combating terrorism and extremism as part of the national security of Belarus, the author in particular uses the 19 December as an example of an attempt to cultivate extremist ideas and methods on the Belarusian land, with such ideas and methods having certain probability to transform into terrorist phenomena.[160] The article suggests arriving to a conclusion that the 19 December 2010 events are ***"an attempt to implement a radical scenario to change the state power right after the elections of the President of Belarus that took place in December 2010, as supported financially, morally and organizationally by certain foreign political forces and intelligence agencies."***[161]

The newspaper *Sovietskaya Belorussiya* organized a round-table discussion, Law and Disorder, and among others invited V. Kalinkovich, deputy chairman of the Supreme Court who also chairs the Penal Chamber of the same.[162] Remarkably, V. Kalinkovich steered away from giving a clear answer to the direct question ***"Doesn't it mean that mass disorders may refer to only those actions of the crowd when it simultaneously uses violence against person, commits destructions and arsons, damages property and commits armed disobedience to public officers all together?"*** V. Kalinkovich's answers made a general impression that he had no grounds to question the legality and reasonability of the sentences imposed under Article 293 of the Criminal Code. This may potentially diminish the effect of filing a supervisory appeal with the Supreme Court regarding any court sentence under Article 293 of the Criminal Code. The newspaper *Belorusskaya Voyennaya Gazeta* did not stay aside as

156 Taking into account that the hyperlink to the Belaruskaya Dumka website, and a short teaser of the articles with online access to their full texts, are displayed on BELTA website near the blog by the magazine's editor-in-chief, V. Gigin, the magazine can be viewed as a significant source to disseminate information. No links to other magazines are seen on BELTA site.

157 Head of the Information Department, Press Secretary of the Main Ideological Directorate of the Ministry of Defence; the author of numerous articles in Belorusskaya Voyennaya Gazeta about the opposition and civil society activists.

158 See: Belaruskaya Dumka, No. 2, 2011, page 22 // http://beldumka.belta.by/isfiles/000167_541519.pdf (in Russian)

159 See link above, page 23.

160 According to V. Zaytsev, the country's geopolitical situation coupled with a possible extrapolation of negative international patterns on the internal political situation in the country is a factor that gives way to such attempts.

161 See: Belaruskaya Dumka, No. 3, 2011, pages 32-37 // http://beldumka.belta.by/isfiles/000167_425895.pdf (in Russian)

162 See: Sovietskaya Belorussiya, 31.03.2011 // http://wap.sb.by/post/114629/part/7/fontsize/9/ (in Russian)

well. As reported by *Solidarnost*, an online information resource, the newspaper published an article by V. Maksimov who insisted that V. Nekliaev had been beaten by his former supporters.[163]

The "investigation" undertaken by the [state-run] print media to "expose" the opposition's plans for 19 December 2010 topped with the article "Behind One Conspiracy" published in *Sovietskaya Belorussiya*.[164] Notably, the disclosed classified materials that were used to prepare the article had been made available to the newspaper under Lukashenko's direct instruction given at a press conference. The newspaper announced that the article would extend to a series of more than three parts, but it did not happen.[165] As a whole, all three published parts are a compilation of abstracts from telephone calls, Skype and e-mail conversations as well as certain police search and detection summary reports and other documents. The materials refer to almost all presidential candidates and their proxies. The information mostly covers financial matters and issues related to the arrangement of the election campaign. Quite substantial attention is paid to the civil campaign "Tell the Truth!" spearheaded by V. Nekliaev. Another focus was made on the plans of Andrey Sannikov, a presidential candidate. The article also narrates of "foreign agents" and their attempts to infiltrate guns and drugs into Belarus. The general impression of the article is that it aimed to prove that the opposition rather planned to swindle more funds out of the West, not to seize power. At the same time, the article fails to provide any serious evidence to prove the authenticity and reliability of its content.

One of the major "exposing" television films was "The Square: Iron against the Glass",[166] broadcast on 9 January 2011 on TV-1. The film was also aired on STV instead of the evening newscast. The film is styled as a documentary and gives an account of the situation before the elections and during the day of 19 December 2010. It is a compilation of video fragments with off-screen comments, presidential candidates' statements and interviews as well as soundtracks of intercepted conversations. The main purpose is to demonstrate that the participation in the elections was not the candidates' primary aim but served as a disguise for the plans to seize power. Again, references are made to explosives and firearms but this time without explicitly linking them to the opposition. It should be noted that some part of the video fragments was taken from the criminal case materials and was later used in the court proceedings.

On 13 January 2011, the STV channel broadcast a "journalist investigation" addressing the question "Who smashed window-panes in the House of Government on 19 December?"[167] The plot was devoted to N. Lihovid who had been kept in custody then. It was full of judgment-like observations and off-screen narrations presented in a way insisting that N. Lihovid had taken part in extremist seminars, made trips abroad at foreign sponsors' expense and evaded the conscription. The broadcast also included an interview with Alla Terentyeva, an elementary school teacher at Secondary School No. 177 (Minsk) who, as figured out lately, had never been N. Lihovid's form-supervising teacher.

On 19 January 2011, STV showed a new television program, The Square: Iron against the Glass. Familiar Pictures, Unfamiliar Details.[168] It was mostly devoted to P. Vinogradov

163 See: Belorusskaya Voyennaya Gazeta insists Vladimir Nekliaev beaten by former followers // http://www.gazetaby.com/index.php?sn_nid=33458&sn_cat=32 (in Russian)

164 See: Sovietskaya Belorussiya. Behind One Conspiracy. Part 1 / http://www.sb.by/post/111079/ (in Russian); Part 2 http://www.sb.by/post/111131/ (in Russian); Part 3 http://www.sb.by/post/111406/ (in Russian)

165 The publication was taken as a basis for an STV broadcast. http://www.ctv.by/node/49327 (in Russian)

166 See: The Square: Iron against the Glass (film). Full version // http://www.ctv.by/node/49186 (in Russian)

167 See: Who did smash window-panes in the House of Government on 19 December? // http://www.ctv.by/node/49277 (in Russian)

168 See http://www.ctv.by/node/49437 (in Russian)

and A. Klaskovskiy. The head of the Public Order and Crime Prevention Unit of Moskovskiy Urban District Department of the Interior (Minsk), Aleksandr Voronin, when describing P. Vinogradov, pointed out that the latter had a track record of criminal prosecution, though omitting any further detail.[169] Also, a conclusion was suggested that if the activist had no official employment in the year of the elections, then the Square was bound to become his official source of income. As for A. Klaskovskiy, it was said that he had been fired from the police for drunk driving.

Regarding N. Lihovid, STV broadcast another item on 27 March 2011, *"19 December in Minsk. The State Security Committee of Belarus. The bottom line is drawn in the search and identification of those who instigated the pogroms at Independence Square,"*[170] which included recorded fragments of N. Lihovid's "monologue." The item once again repeated, making a reference to N. Lihovid, that when he became a member of the opposition, he got an idea of what "extremist seminars and foreign trips for foreign money" were like. Similarly to any previous TV coverage, this one also gives no clarity as far as details are concerned, and the video fragments are again presented as a so-called highlights reel. Immediately after N. Lihovid says he heard N. Statkevich (a presidential candidate) urging to go to the Square, a video fragment pops in where N. Statkevich is speaking emotionally over the microphone, though his particular words cannot be heard distinctly. It should be noted that this item was broadcast a few days prior to the court verdict to N. Lihovid. It also included some extracts of what was said by the then newly detained people, i.e. Denis Guseltsev, Aleksey Sherstov, Vitaly Matsukevich and Vladimir Homichenko. D. Guseltsev[171] told that, influenced by N. Statkevich's speeches, they started urging to attack the House of Government and one man broke a window-pane. V. Matsukevich[172] apologized to all the families whose children were behind the bars in prisons.

On 26 January 2011, STV aired another broadcast, Hero of the Square: Deceived People Knew Nothing of the Plans.[173] The basic idea behind the plot is that the burden of liability for the organizers' mistakes was put on ordinary participants' shoulders. Among other things, a quite ambiguous post in the blog by Y. Romanchuk (a former presidential candidate) was quoted implying that those political leaders *"who let the events develop into a bloody, cruel scenario at Independence Square"* should take up the responsibility for what had happened. At the end, the broadcast informed that the opposition had already engaged in negotiating sanctions against Belarus with the West.

A new STV broadcast went on the air on 27 January 2011: "The Square: People who staged the glass-crackling "combat" performance were recruiting youngsters right on site, offering money for vandalism."[174] The purpose was to communicate that the chaos in the Square was organized at foreign sponsors' expense, that the perpetrators had their "paymaster"[175] and that V. Nekliaev had the largest budget at his disposal. As was reported, the financial information came from an anonymous member of the Belarusian opposition.

On 26 March, STV broadcast a new item: *"Vitaly Matsukevich, a participant of the 19*

169 A defendant in the Case of the Fourteen, he was sentenced under Article 342 of the Criminal Code to the restriction of liberty.

170 1See: 19 December in Minsk. The State Security Committee of Belarus. The bottom line is drawn in the search and identification of those who instigated the pogroms at Independence Square // http://www.ctv.by/

171 Escaped criminal charges.

172 Eventually sentenced under Article 293 of the Criminal Code.

173 See http://www.ctv.by/node/49661 (in Russian)

174 http://www.ctv.by/node/49703

175 Has never been found.

December events: I would like to express my apology to all those who suffered from that, to all the Belarusian people."[176] In particular, it announced that Nikolay Statkevich, charged with the organization of mass disorders, had finished reading the criminal case materials. It was also reported that he signed the respective minutes [author: which probably acknowledge his having read the materials] and that these minutes were the first N. Statkevich had signed since the start of the pre-trial investigation. It was added thereafter that *"Statkevich did not express any doubts about the provability of his guilt."* Taking into account that N. Statkevich never pled himself guilty of the incriminated offences, one can only guess what the broadcast authors were driving at, whereas any failure to sign a protocol acknowledging familiarization with criminal case materials have no legal consequences whatsoever.

In an interview to *The Washington Post*, A. Lukashenko gave one of his accounts of the 19 December 2010 events,[177] insisting that "the fifth column" in Belarus was funded inter alia from the USA, Poland and Germany and, as a result, those people *"who fell for your [US] propaganda, who took money from you [USA], now have to work this money off."*

It should be noted that government bodies themselves (KGB and Minsk City Department of the Interior) also acted as newsmakers by disseminating information which was later taken up by the media. For instance, as early as 20 December 2010, a group of students visited the policemen that took part in the crackdown on the meeting and got injured. This move was publicized on the website of Minsk City Department of the Interior: *"We just wanted to act humanly and say 'thank you' to those who* ***made it possible for all the city's young students to go to their studies undisturbed*** *in the morning of 20 December,"* said Olga, an MSLU student."[178] The website of the KGB Information and Public Relations Center published a photo of A. Mihalevich, a presidential candidate, and his letter to Lukashenko where he apologized for what had happened and requested the President to take his future under his personal control. That was done in response to A. Mihalevich's public statements about torturing in the KGB pre-trial detention center and compelling him to cooperate. Naturally, the state-run mass media left unnoticed any subsequent statements by A. Mihalevich explaining that the letter to Lukashenko was a coercive measure.[179] At a press conference in April 2011, officials of the General Prosecutor's Office disclosed a video record made by hidden camera where A. Mihalevich agrees to cooperate with the KGB.[180] At the same time, the prosecutors failed to give any answer to the question whether A. Mihalevich had been informed of being recorded.

Thus, in the course of pre-trial investigation and subsequent court proceedings, the state-run mass media quite actively used materials of criminal cases and search and detection records to get ready for their information issues. Some publications were made under direct instruction from the head of state. The latter also sanctioned the disclosure of certain classified documents. Generally, the information was presented in a fragmentary, unilateral and biased manner and was capable to give rise to manipulations of the public opinion. Those people who couldn't have ever taken part in the 19 December events — and they really didn't (e.g. M. Finberg, N. Cherginets, A. Surikov or V. Gigin) — often were among primary interviewees. It had been repeatedly reported about minibuses with explosives, firearms, big money, and the opposition's connections with foreign agents for quite a long period of time. Such information was neither proved in court nor refuted [by the state-run

176 See http://www.ctv.by/node/51608 (in Russian)

177 See http://www.ctv.by/ (in Russian)

178 See: City Police: Youth doesn't stay aside // http://guvd.gov.by/news/1489.html (in Russian)

179 This resembles the story of Yaroslav Romanchuk's statement made shortly after the crackdown on the 19 December rally.

180 See: Taped Mihalevich's OK to cooperate with KGB disclosed to journalists // http://www.interfax.by/news/belarus/90221 (in Russian)

media]. The question whether Ya. Romanchuk's statement at the 20 December 2010 press conference was forced or deliberate is still open.

2.6. Public Control over the Human Rights Observance in the Context of the Criminal Trials

For the purposes of this study, we will refer to the public control over the fairness of the criminal proceedings as the collection and dissemination of information about the course of the criminal trials and violations of rights and freedoms of the accused. The recipients of the information obtained through such public control activities are the general public, state agencies and international mechanisms of monitoring human rights observance. The main public control actors in the context of the criminal trials under study were human rights defenders, OSCE observers, observers from the NGO coalition – the International Observation Mission of the Committee on the International Control over the Human Rights Situation in Belarus (hereinafter referred to as the "CIC Mission"), foreign diplomats, family members, relatives and friends of the accused, the mass media and other representatives of the public.

Pre-trial Investigation. Pre-trial Investigation. Any public control at this phase of a criminal process is quite hard to implement, first of all, due to the provisions of the Belarusian Code of Criminal Procedures. The defendants' lawyers did not disclose almost any information as they either feared negative reaction from the Ministry of Justice or simply had no such information, because their access to the clients was restricted. State bodies refused to give the media almost any information regarding the cases of those in custody. More information started coming in only after the custody of some defendants had been replaced for other type of pre-trial restraint. Reaction from human rights defenders in that period mostly took form of: 1) reports on suspected violations addressed to the UN special procedures and 2) complaints to state agencies. In so doing, a number of human rights defending organizations[181] applied on 18 February 2011 to the Special Rapporteur on the independence of judges and lawyers with a report informing that the advocacy licences of such lawyers as Vladimir Tolstik, Tamara Garayeva, Oleg Ageev and Tatsiana Ageyeva had been withdrawn and that the chairman of Minsk City Bar Association Aleksandr Pylchenko had been expelled from the Advocacy Qualification Board.[182] Also, after A. Mihalevich, following his release from custody, made a statement claiming that he had been tortured while in the KGB pre-trial detention center, the Belarusian Helsinki Committee (BHC) filed a complaint with the General Prosecutor's Office requesting to verify this information.[183] The BHC complaint was later enclosed with a similar complaint by A. Mihalevich.[184]

Court Hearings. This criminal process phase is the most suitable for exercising public control as the publicity of court hearings is provided for by Article 23 of the Code of Criminal Procedures and by Article 14 (1) of the International Covenant of Civil and Political Rights.

a) The OSCE/ODIHR carries out monitoring of court proceedings to provide assistance to the OSCE member states in the development of reforms and policies aimed to improve respect to the rule of law and human rights. On 7 March 2011, ODIHR Director Janez

181 Foundation for Legal Technologies Development, Legal Transformation Center, Human Rights Center, Belarusian Human Rights House, Committee for Defence of the Repressed "Salidarnasc", Human Rights Center "Viasna", Belarusian Helsinki Committee, and human rights defender Boris Zvozskov.

182 See: Human rights defenders reported to the UN Special Rapporteur on the independence of judges and lawyers about A. Pylchenko's expulsion from the Advocacy Qualification Board // http://belhelcom.org/node/13043 (in Russian)

183 See: Human rights defenders requested the General Prosecutor's Office to protect Aleksandr Mihalevich // http://belhelcom.org/node/13064 (in Belarusian)

184 See: BHC application regarding the Mihalevich case is entered into the check files // http://belhelcom.org/node/13170 (in Belarusian)

Lenarcic informed that an observation mission was going to be deployed. He emphasized that *"as a participating State of the OSCE, Belarus is committed to accepting the presence of international trial monitors. The observers will assess the trials for their consistency with national law and fair trial standards as specified in OSCE documents and legally binding international covenants."*

Observers from this organization had the broadest opportunities to monitor court proceedings. They monitored hearings of 10 criminal cases in courts of first and second instances as well as of two additional cases in a court of second instance only, covering a total of 41 defendants.[185] The OSCE observers were present only at the public phase of court hearings. In total, there were eight observers from seven countries, with the overall number of no more than four observers simultaneously staying in the country. When the trials were over, the observers met with the most of the defendants' lawyers and had four meetings with a representative of the General Prosecutor's Office. None of the judges agreed to meet. The OSCE observers also met with representatives of the Ministry of Justice and the Supreme Court and with human rights defenders. At the same time, the OSCE trial observation mission did not get access to the content of the verdicts. The mission's work resulted in a report[186]with a generally negative evaluation of the criminal trials in terms of their compliance with national law and international standards. In this regard, the report includes 33 detailed recommendations to remove the flaws in both the criminal and procedural law and the national judicial system. The report has a topical structure in accordance with applicable standards of fair court hearings.

b) CIC Mission. The International Observation Mission of the Committee on the International Control over the Human Rights Situation in Belarus was established by representatives of non-government organizations in the OSCE countries and international civil networks and associations, inter alia, for the monitoring of the court proceedings.[187] The CIC Mission observers were also present at the trials under study but, in contrast to their OSCE colleagues, not always managed to get into the courtroom[188] and in general faced persecution on the part of the authorities.[189] That notwithstanding, the Mission went on doing their work. The Mission published a number of reports[190] covering the results of moni-

185 For more information about the OSCE/ODIHR trial monitoring, see: OSCE/ODIHR Report: Trial Monitoring in Belarus (March-July 2011) // http://www.osce.org/odihr/84873; Also: Alexey Kozliuk. METHODS OF MONITORING ADMINISTRATIVE AND CRIMINAL CASES RELATED TO THE 19 DECEMBER EVENTS. LAWTRENDMONITOR 2012, No. 2/3, pages 12-19 http://lawtrend.org/en/data/994/

186 See: OSCE/ODIHR Report: Trial Monitoring in Belarus (March-July 2011) // http://www.osce.org/odihr/84873

187 Statement #1 of the long-term International Monitoring Mission // http://hrwatch-by.org/en/statement-1-long-term-international-monitoring-mission

188 It should be noted that the OSCE mentioned in its report as a negative factor that observers from the coalition of human rights defending NGOs were banned from access to courtrooms on all occasions.

189 See: Head of the International Observation Mission is being deported from Belarus // http://hrwatch-by.org/en/head-international-observation-mission-being-deported-belarus ; Russian human rights defenders again ordered home against Russia's MFA hopes // http://hrwatch-by.org/vopreki-nadezhdam-mida-rf-vlasti-belarusi-v-ocherednoi-raz-vydvoryayut-rossiiskikh-pravozashchitniko (in Russian); Belarus declares war to Ukrainian civil society // http://hrwatch-by.org/belarus-obyavila-voinu-ukrainskomu-grazhdanskomu-obshchestvu (in Russian); Belarus locked from Ukraine's human rights defenders: Episode Two // http://hrwatch-by.org/belarus-zakryta-dlya-ukrainskikh-pravozashchitnikov-epizod-vtoroi (in Russian); Human Rights defenders are expelled from the country right from court premises // http://hrwatch-by.org/en/human-rights-defenders-are-expulted-country-right-court-premises; Press briefing on Maxim Kitsiuk's deportation // http://hrwatch-by.org/press-brifing-po-povodu-deportatsii-maksima-kitsyuka (in Russian).

190 Monitoring of trials related to the 19 December events in Minsk: the Otroshchenkov, Molchanov and Novik case // http://hrwatch-by.org/monitoring-sudov-po-sobytiyam-19-dekabrya-v-minske-delo-aleksandra-otroshchenkova-molchanova-novika (in Russian); Russians were taken to court: extend and don't have mercy on // http://hrwatch-by.org/en/russians-were-taken-court-extend-and-don-t-have-mercy ; Belarus: the first criminal trial for December 19th case // http://hrwatch-by.org/en/belarus-first-criminal-trial-december-19th-case

toring several court trials. Also, as dictated by the generally accepted monitoring standards, the Mission applied to the chairs of urban district courts in Minsk and requested to ensure that the then upcoming trials were held publicly, transparently and accessibly.[191] In its Statement No. 4, the International Observation Mission drew attention to failures to observe standards of open and transparent trial during the court hearings of the criminal cases against the participants of the 19 December events. Some recommendations were later taken into account, for example, the one regarding the announcement of the date, time and place of a trial and related information in reasonable advance.[192] Based on the Mission's work results, the Committee of the International Control over the Human Rights Situation in Belarus recognized persons convicted in the court trials related to the 19 December events as political prisoners and demanded immediate revision of all the criminal cases.[193]

c) Belarusian human rights defenders. Beside the monitoring mission of the Legal Transformation Center,[194] many representatives of Belarusian human rights organizations and individual human rights defenders took part in the observation, including the Belarusian Helsinki Committee (BHC),[195] Human Rights Center "Viasna",[196] Human Rights Center[197], Committee for Defence of the Repressed "Salidarnasc" (Salidarnasc),[198] representatives of the unregistered pensioners' association Our Generation and others. The primary goal of the human rights defenders was to collect information about actual or potential violations of the defendants' right to a fair trial and make subsequent analytical reports that, inter alia, would be of help for the defendants' lawyers.

The human rights defenders did a significant job in collecting reliable information about the conduct of the 19 December 2010 mass events for further inclusion in the records of the criminal cases. Some human rights defenders, who personally attended the 19 December events, appeared in court as defence witnesses. Also, the Human Rights Center together with the Legal Transformation Center (Lawtrend) took up to find witnesses among those who participated in the protest action.[199] Needless to mention, the state was in no position to ensure favourable conditions for the human rights defenders. It is especially true in relation to the access to, and the accommodation in, the courtroom. As a rule, the human rights defenders together with the general public were the last in the row after the OSCE observers, foreign diplomats, relatives of the defendants and the media. On entering the court building and the courtroom, the human rights defenders were patted down and a video record of them was made by unknown people. The human rights defenders enjoyed no special rights and in most cases fully depended on the discretion of those who was in charge of controlling the access to the court building and courtrooms.

191 See: Human rights defenders request to ensure the participants of the 19 December events are tried publicly // http://hrwatch-by.org/pravozashchitniki-prosyat-obespechit-publichnost-protsessov-nad-uchastnikami-sobytii-19-dekabrya (in Russian); Open trial: a new standard? Human rights defenders and journalists try and guess // http://hrwatch-by.org/otkrytost-suda-novyi-standart-pravozashchitniki-i-zhurnalisty-putayutsya-v-dogadkakh (in Russian)

192 See link above.

193 See paragraph 6 of the report "International Observation Mission in Belarus: 6 months' work in the country" // http://hrwatch-by.org/en/international-observation-mission-belarus-six-months-work-country

194 See: Alexey Kozliuk. LAWTREND MONITORING TEAM WAS A RESPONSE TO THE CHALLENGE. LAWTRENDMONITOR 2012, No. 1, pages 12-13 http://lawtrend.org/en/data/979/

195 http://belhelcom.org/criminal-cases

196 http://spring96.org/be/mass-riot-2010?page=2

197 See: Raisa Mihailovskaia: "19 December changed us all of us – every human rights defender in particular and organizations in general." LAWTRENDMONITOR 2012, No. 2/3. pages 22-23 http://lawtrend.org/en/data/994/

198 http://salidarnasc.org/

199 See: Raisa Mikhailovskaia: "19 December changed all of us – every human rights defender in particular and organizations in general." LAWTRENDMONITOR 2012, No. 2/3. pages 22-23 http://lawtrend.org/en/data/994/

d) Foreign diplomats. Representatives of the Russian Federation Embassy in Belarus attended only the trials that involved Russian citizens as defendants. In turn, representatives from the EU embassies were present at all the court proceedings in question.[200]

e) Mass Media. When analyzing the work done by the state-run and independent media, it should be noted that the primary task of the former was to make a video record of the defendants "in the cage" and later pronounce their conviction. On a rare occasion, the footage was accompanied by an interview of the public prosecutor.[201] In contrast, the independent media paid much attention to the details of the process. The most common form was an updated online coverage consisting of periodic brief reports from the courtroom. As a result, the websites of independent mass media were able to upload quite detailed transcripts of the examinations and speeches by the prosecution and defence.[202] It made it possible to involve the readers in the process of public control even despite their will as such "transcripts" provoked discussions and debates in the Internet. At the same time, it should be noted that none of the courts permitted to make photos and video records both inside the court buildings and courtrooms. In some cases, the cameras had to be carried away from the courtroom for the hearings to start. In other cases, independent journalists with video equipment at hand were banned from entering the court building or courtroom. Contrastingly, representatives of the state-run mass media (especially of the STV channel) were let into the courtroom well in advance so that they could take pictures and make videos of the accused "in the cage" and make "proper" reports.

f) Civil society activists, politicians and other representatives of the general public attended most of the trials. Among them, the priority of access to the courtroom was given to family members and relatives of the accused, though it sometimes happened that there was no room for them and they were not let in. At the same time, only a few human rights defenders and journalists appeared to visit the court trial against S. Baranovich, which was the last one in the series and significantly lagged behind the previous trials.

In general, based on the analysis of public control in the context of the criminal processes under study, it can be acknowledged that this issue gained close attention right in the first days after the events when it became known about the prosecution of the protest action organizers and participants. Despite the lack of transparency in the Belarusian system of justice and no public access to texts of the sentences, the civil society managed to obtain sufficient information about the course of the court proceedings. It largely happened due to the presence of the mass media, OSCE/ODIHR observers and foreign diplomats and, most of all, due to the consolidation of the human rights movement both in Belarus and the OSCE member countries.

200 According to observers, a representative of the German Embassy and the Swedish Ambassador Stefan Ericsson were the most frequent trial visitors.

201 See: Cessation appeal from 19 December events participant Vasiliy Parfenkov dismissed // http://www.ctv.by/node/51578 (in Russian); OSCE representatives monitor the trial of 19 December disorders participant Nikita Lihovid // http://www.ctv.by/node/51456 (in Russian)

202 See: Statkevich to spend 6 years in prison (photo and video from the courtroom) // http://nn.by/?c=ar&i=54910 (in Belarusian) or: Trial of Dmitriy Bondarenko // http://www.svaboda.org/content/article/9505364.html (in Belarusian)

III. ANALYSIS AND EVALUATION

III. ANALYSIS AND EVALUATION

3.1. Objectives, Tasks and Subject Matter of the Study

This study aims to analyze the basic principles of the right to a fair court hearing at different phases of the criminal process applied to prosecute those who took part in the 19 December 2010 events. This right includes a number of interrelated aspects. The protection of the right to a fair court hearing and to the observance of due legal process include the protection of other human rights which are of key importance to guarantee that various aspects of fair court proceedings and proper procedural regulations are observed. When the said norms are neglected, it may lead to serious implications for the very existence of a fair court hearing.

The task of this study is to assess how the national legislation and law-applying practices in Belarus comply with international human rights standards when used as a basis for investigation and administration of justice in criminal proceedings on specific cases, in particular those instituted in connection with the events of 19 December 2010.

This study analyzes national law and law-applying practices mostly on the basis of the following documents which lay down international standards of human rights: the International Covenant on Civil and Political Rights (ICCPR), General Comments by the UN Human Rights Committee, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (Convention against Torture).

The study also uses documents by international organizations and institutes established by these international organizations:

- Basic Principles on the Independence of the Judiciary;[1]
- Bangalore Principles of Judicial Conduct;[2]
- Recommendation R (94) 12 of the Committee of Ministers (of the Council of Europe) to Member States on the Independence, Efficiency and Role of Judges;[3]
- Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges;[4]
- European Charter on the Statute for Judges.[5]

In addition, the study uses reports by international institutions, national experts and nongovernmental organizations:

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1 *UN Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) // http://www2.ohchr.org/english/law/indjudiciary.htm*

2 *Bangalore Principles of Judicial Conduct (the Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002) // http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf*

3 *Recommendation R (94) 12 of the Committee of Ministers (of the Council of Europe) to Member States on the Independence, Efficiency and Role of Judges (adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies) // http://www.hjpc.ba/dc/pdf/Recommendation%20no%20R%20(94)%2012.pdf*

4 *Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges. CCJE (2001) OP N°1. // http://www.summitofhighcourts.com/docs/standarts/CCJE1.doc*

5 *European Charter on the Statute for Judges (adopted by the participants of the second multilateral meeting devoted to the Status of Judges, Strasbourg, 8-10 July 1998) // http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf*

• OSCE/ODIHR Report: Trial Monitoring in Belarus (March–July 2011);[6]

• Report by Belarusian Nongovernmental Organizations and Human Rights Defenders on Belarus' Observance of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, in relation to Belarus' 4th periodic report at the 47th session of the UN Committee against Torture, October 2011;[7]

• Concluding Observations of the Committee against Torture: Belarus, 2011;[8]

• OSCE Rapporteur's Report on Belarus (by prof. Emmanuel Decaux), 28 May 2011;[9]

• Report on the detentions, prosecutions and convictions of members of the opposition in Belarus in the aftermath of the 19 December 2010 presidential elections by ad hoc committee of the PACE Bureau on recent detentions, prosecutions and convictions of members of the opposition in Belarus, Strasbourg, October 2011;[10]

• Shattering Hopes: Post-Election Crackdown in Belarus, a report by Human Rights Watch;[11]

• Belarus: Restrictions on the Political and Civil Rights of Citizens Following the 2010 Presidential Election, a report by the International Federation for Human Rights;[12]

• Interim Human Rights Assessment of the 19 December 2010 Events in Minsk, Belarus, by the Special Rapporteur of the Committee on International Control over the Human Rights Situation in Belarus (CIC);[13]

• Final Human Rights Assessment of the 19 December 2010 Events in Minsk, Belarus, by Neil Jarman, the Special Rapporteur of the Committee on International Control over the Human Rights Situation in Belarus (CIC);[14]

• Report of the UN High Commissioner on Human Rights on the Situation of Human Rights in Belarus, 10 April 2012.[15]

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6 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011. // http://www.osce.org/odihr/84873

7 Report by Belarusian Nongovernmental Organizations and Human Rights Defenders on Belarus' Observance of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, in relation to Belarus' 4th periodic report at the 47th session of the UN Committee against Torture, October 2011. // http://www2.ohchr.org/english/bodies/cat/docs/ngos/NGOCoalition_Belarus47_ru.pdf

8 Concluding Observations of the Committee against Torture: Belarus, 2011. // http://www.unhcr.org/refworld/topic,4565c225e,4565c25f16d,4f1d51c82,0,,,BLR.html

9 OSCE Rapporteur's Report on Belarus (by prof. Emmanuel Decaux). Vienna, 28 May 2011. // http://www.osce.org/node/78705

10 Report on the detentions, prosecutions and convictions of members of the opposition in Belarus in the aftermath of the 19 December 2010 presidential elections by ad hoc committee of the PACE Bureau on recent detentions, prosecutions and convictions of members of the opposition in Belarus. Strasbourg, October 2011. // http://www.assembly.coe.int/CommitteeDocs/2011/axdoc_ahbelarus_2011%2002Rev3.pdf

11 Shattering Hopes: Post-Election Crackdown in Belarus. Human Rights Watch, 14 March 2011. // http://www.hrw.org/sites/default/files/reports/belarus0311Web.pdf

12 Belarus: Restrictions on the Political and Civil Rights of Citizens Following the 2010 Presidential Election. International Federation for Human Rights, June 2011. // http://www.fidh.org/IMG/pdf/rapport_Belarus_En_web.pdf

13 Interim Human Rights Assessment of the 19 December 2010 Events in Minsk, Belarus, by the Special Rapporteur of the Committee on International Control over the Human Rights Situation in Belarus (CIC). // http://www.osce.org/odihr/83291

14 Final Human Rights Assessment of the 19 December 2010 Events in Minsk, Belarus, by Neil Jarman, the Special Rapporteur of the Committee on International Control over the Human Rights Situation in Belarus (CIC). // http://old.eurobelarus.info/images/stories/Final_HRights_Assessment_of_19-12-2010_in_Minsk-eng_final.pdf

15 Report of the United Nations High Commissioner on Human Rights on the Situation of Human Rights in Belarus, 10 April 2012.// http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-8_en.pdf

The study also makes use of national experts' reports prepared within the joint United Nations Development Programme (UNDP) and United Nations Children's Fund (UNICEF) project, Promotion of a Wider Application of International Human Rights Standards in the Administration of Justice in Belarus.

The following norms of the national legislation were subjected to comparative analysis and assessment: the Constitution of the Republic of Belarus, the Criminal Code, the Code of Criminal Procedures, the Law on Investigative Activity, the Law on the Advocacy and the Activity of Lawyers, the Law on Public Associations, the Law on Prosecuting Bodies and other laws as well as the Belarusian law-applying practices as specified in resolutions by the Plenum of the Supreme Court of the Republic of Belarus.

The study also used materials of the criminal cases instituted in relation to the 19 December 2010 events, records of open court hearings, sentences, minutes of court hearings, legal perspectives from the viewpoint of the prosecution and the defence in their speeches during court debates, interpretations of individual legal elements concerning those rights and freedoms the exercise of which was either restricted or violated in the course of pre-trial investigation into, and court hearing of, the above-mentioned criminal cases.

Structured thematically to address applicable standards of fair court hearing, this study is subdivided into three sections. The first one seeks to analyze if general standards of a fair trial are observed. It includes the analysis of the right to a fair trial by an independent, impartial and competent court established by law with due account of whether the national legislation meets these international standards. In addition, this section covers such issues as the independence of lawyers and the role of the prosecution and victims in particular criminal cases.

Section two of the study assesses whether standards governing pre-trial procedures were observed, including the right to liberty and prohibition of arbitrary detention, the right to be notified of the reasons for detention and of any charges against the detained, the right to be notified of one's own rights, the right to legal assistance before trial, the right to adequate time and facilities to prepare for the defence, the right not to be held incommunicado (without access to the outer world), the right to be promptly brought before a judicial official, the right to challenge the lawfulness of one's detention, the right to a court hearing within reasonable time, the right to humane treatment and freedom from torture under detention in custody.

Section three contains the analysis of whether fair trial standards were observed at the judicial phase, such as the right to a fair court hearing, the right to a public hearing, the right to defence, the observance of the presumption of innocence, the right to be present at the court hearing in person, the right to equality of arms, the right to call and examine witnesses, the right not to be compelled to confess guilt or testify against oneself, exclusion of evidence obtained illegally, including one obtained through torture or maltreatment, the right to be tried by court, prohibition of repeated criminal liability for the same charges (double jeopardy), the right to a public and substantiated court decision, and the right to appeal.

Each section gives account of applicable international norms, reviews the respective national laws as they were applied to the above-mentioned events of 19 December and compares them to the applicable international norms.

International treaties (or instruments) are among the most significant means for the development of international cooperation. They promote the extension of international ties between both governmental and nongovernmental organizations, subjects of national law including physical persons. International treaties play the primary role in the protection of human rights and fundamental freedoms.

Article 8 of the Constitution of the Republic of Belarus includes the provision binding Belarus to recognize the priority of generally accepted principles of international law and ensure that the national legislation conforms to them.

According to Article 21, Part 3 of the Constitution, the state guarantees the rights and freedoms of Belarusian citizens which are specified in the Constitution and national laws and/or arise out of the state's international commitments.

According to Article 33, Part 2 of the Law on International Treaties of the Republic of Belarus, the norms of law specified in international treaties of the Republic of Belarus are part of the legislation effective in the territory of Belarus and are subject to direct application unless an international treaty requires adoption (issuance) of a domestic normative legal act for such norms to be applied.

Article 3 of this Law specifies that international treaties of the Republic of Belarus must be implemented in accordance with the Constitution of the Republic of Belarus, generally accepted principles of international law, and the Vienna Convention on the Law of Treaties of 23 May 1969.[16] The Vienna Convention establishes a principle specifying that *"every treaty in force is binding upon the parties to it and must be performed by them in good faith."* It also provides that *"a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."*

The Code of Criminal Procedures of the Republic of Belarus stipulates that international treaties of the Republic of Belarus which determine rights and freedoms of a person and citizen must be applied in the criminal process alongside with the Code itself (Article 1, Part 4 of the Code of Criminal Procedures).

The above-mentioned norms of law serve as a proof that legal requirements for the provisions of international treaties ratified by Belarus to be part of its internal legal system are specified at the both constitutional and legislative levels.

The study also determines the extent to which international legal obligations set forth in international treaties are implemented domestically, with due account of international standards specified in UN resolutions, resolutions and recommendations by the Committee of Ministers of the Council of Europe, in documents by other international institutions as well as in decisions by international judicial bodies on specific cases (considerations by the Human Rights Committee and decisions by the European Court of Human Rights).

Belarus' obligation to fulfill UN recommendations arises out of its membership in this organization and responsibility to honor commitments undertaken under the UN Charter.

When analyzing European standards, it should be kept in mind that although Belarus is neither a member state of the Council of Europe nor a party to the European Convention on Human Rights, almost all the Convention norms are, in essence, implemented in Belarus at the constitutional level. Moreover, the use of documents by bodies of the Council of Europe in Belarus' law-applying practices is also relevant for the country as it is willing to accede to the Council of Europe and, in case of its accession, will have to take measures to harmonize its legal system with European standards.

The Constitutional Court of the Republic of Belarus acknowledges that it is mandatory for the national laws and law-applying practices to conform to international standards specified, inter alia, in the norms of the so-called "soft law." The Constitutional Court points out that the Belarusian national legislator views European standards as a certain target to be used to improve legal regulation of respective relations.[17]

16 http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

17 See, for example, Decision No. P-530/2010 dd. 23 December 2010 adopted by the Constitutional Court of the Republic of Belarus: On the conformity with the Constitution of the Republic of Belarus regarding the Law of the Republic of Belarus "On Changes and Amendments to the Law of the Republic of Belarus on Investigative Activity." // Consultant plus: Belarus [electronic resource] / OOO YurSpektr, Minsk, 2012.

Thus, an evident and justified conclusion can be drawn that international norms and standards in the field of the right to a fail court hearing are mandatory for the legal system of the Republic of Belarus and must be properly implemented by the state.

3.2. Observance of General Fair Trial Standards

3.2.1. Right to a Trial by an Independent, Impartial and Competent Court Established by Law

The right to a fair court hearing is a generally accepted international legal norm directly related to human rights. The right to be tried for a criminally prosecuted offence by an independent, impartial and competent court which observes all procedural and legal guarantees is a right that is commonly acknowledged and protected worldwide. The UN International Law Commission emphasized that any person charged with committing a crime, including any of those stipulated by international law, has the right to a fair trial, as was also underlined in the principles governing the Nuremberg Trials after World War II. Since then, this principle related to the kind of treatment any person charged with any crime has the right to, and the procedures following which such person's guilt or innocence may be objectively established, has been implemented and developed in several international and regional treaties and instruments in the field of human rights.

As commented by the UN Human Rights Committee, the right to be tried by an independent, impartial and competent court is an absolute right allowing no exceptions. No exceptions are also allowed with regard to most of substantive and procedural guarantees which are inherent to due process of law.

The Universal Declaration of Human Rights sets forth a general provision in this field: *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"* (Article 8).

Any provision of remedies or access to justice makes constructive sense only when and if a judicial body is really capable of effective remedy. In this regard, the international community has worked out and set forth, in the norms of international law, mandatory forms of judicial procedures called 'fundamental guarantees' which meet the perceptions of a fair court procedure.

In its Article 10, the Universal Declaration of Human Rights formulates procedural guarantees in the most general manner: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

The International Covenant on Civil and Political Rights makes this general wording more specific: *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"* (Article 14, paragraph 1).

In setting up procedural guarantees, the European Convention for the Protection of Human Rights and Fundamental Freedoms does not essentially differ from the Covenant: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"* (Article 6, paragraph 1).

Judicial independence and impartiality are two of the most fundamental components of a fair trial. As explained in paragraph 19 of General Comment No. 32 by the UN Human Rights Committee, *"the requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, paragraph 1* [of the Covenant], *is an absolute right that is not subject to any exception."* Based on binding provisions of international law and OSCE

commitments, all those criminally charged in Belarus have the right to be tried by a competent, independent and impartial court established by law.

The UN Basic Principles on the Independence of the Judiciary (Basic Principles) include norms that specify: relations between the judiciary and other branches of power; selection, appointment and training of judicial officers; conditions of their service and tenure; immunity of judges and procedures for their suspension and removal. Paragraph 19 of UN HRC General Comment No. 32 provides that *"States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."*

All tribunals and courts must be independent from the executive and legislative powers and from parties to a trial as well. It means that neither the judiciary on the whole nor particular members of it may depend on other branches of the state power or parties to a trial. The courts must be genuinely independent and free from any form of influence or pressure on the part of other branches of power or any other part.

Judicial independence must be guaranteed by a country's constitution, laws and policies and must be practiced by the executive power and its agencies and representatives as well as by the legislature.

The judiciary must be independent in terms of the internal structure of judicial administration including the allocation of cases to particular judges within the courts they belong to.

The process of appointment to judicial office must be transparent and meet strict selection requirements. In general, it is preferable that judicial appointments are made by judges or a body independent from the executive branch or legislature. Appointments made by the executive compromise the independence of the judiciary. The criterion for appointment to judicial office must be the candidate's capability to occupy the position based on his/her professionalism, abilities, legal knowledge and appropriate training in law.[18]

The judges must have a guaranteed tenure until reaching the age of mandatory retirement or until the expiry of their powers. The term of judicial office, adequate remuneration and pension, conditions of social and physical insurance, age of retirement, disciplinary and protective mechanisms and other conditions of work must be provided and guaranteed by law. Any procedures for the promotion and encouragement of judges must be based on objective criteria, first of all, such as qualifications, professionalism and experience.

Judges must be subject to removal only for behaviour that renders them unfit to discharge their duties, for the commission of a crime or reasons of incapacity. Judges also enjoy personal immunity from civil suits claiming compensation for material damages resulted from the exercise of their judicial functions.[19]

An accused person has the right to be brought before an impartial court. Tribunals, courts and judges must be impartial. As explained in paragraph 21 of General Comment No. 32 by the UN Human Rights Committee, *"the requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."*

The principle of impartiality establishes the respective obligation of a judge to self-disqualification (recusal) in case he/she, in the course of discharging his/her official du-

18 UN Basic Principles on the Independence of the Judiciary, principle 10.

19 UN Basic Principles on the Independence of the Judiciary, principle 16.

ties, identifies circumstances preventing him/her from impartial administration of justice or compromising his/her impartiality. In such cases, it is necessary to recuse *sua sponte* and abstain from participation in the proceedings. If grounds for the disqualification of a judge or for the challenge of his/her right to hold particular hearings are specified by law, the court is obliged to consider these grounds *ex officio* and replace any member of the court to which such grounds are applicable.

An accused person has the right to be brought before a competent court established by law. Tribunals, courts and judges must be competent. *"Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."*[20]

As a rule, military tribunals, whose jurisdiction must be strictly limited to military crimes committed by the military, must not be entitled to hear cases against civilians and military or police personnel in cases of human rights violations with regard to civil persons. Tribunals and courts as well as their jurisdictions, duties and responsibilities must be established in advance by national law.

In accordance with Article 80 of the Constitution of the Republic of Belarus, everyone is guaranteed the protection of his/her rights and freedoms by a competent, independent and impartial court.

The principle of the independence of the judiciary is established in Article 110 of the Constitution of the Republic of Belarus: *"in the administration of justice, judges shall be independent and only abide by the law"* as well as *"any interference in the activity of judges related to the administration of justice shall be unacceptable and entail liability under law."* These constitutional regulations intend to serve as a basis for the distribution of powers between the executive branch, legislature and the judiciary.

The above-mentioned provisions are almost word for word repeated in Article 85 of the Code of Judicial Administration and the Status of Judges of the Republic of Belarus (Judicial Code) which, in turn, provides a number of guarantees for the independence of judges. The Judicial Code regulates procedures for the appointment, suspension and removal of judges, their immunity, their work, secrecy of their deliberations and many other matters as well as guarantees concerning their status, independence and impartiality.[21]

These regulations are supported by Articles 388, 389 and 390 of the Criminal Code which specify punishment for any attempt to exert influence on a judge as well as by Articles 77, 78 and 79 of the Code of Criminal Procedures which provide that, should a judge be unable to preserve impartiality, he/she must abstain from participation in the case. These provisions correspond to international standards securing the judicial independence and impartiality.

At its Plenary Session of 23 December 1999, the Supreme Court of the Republic of Belarus adopted Resolution No. 14, On the Enhancement of the Culture of Judicial Activity and Improvement in the Arrangement of Judicial Processes. This resolution refers to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights as documents outlining the principle of the protection of rights and freedoms of a person by a competent, independent and impartial court. Paragraph 3 of the resolution explains that the provision of the judicial independence must become a moral duty of any judge and the most important guarantee for the fulfillment of legal requirements in the administration of justice. Any direct or indirect interference in judicial activity and any attempts to influence the court, regardless of their originator or of the form they may take, must be

20 *UN Basic Principles on the Independence of the Judiciary, principle 5.*

21 *Code of Judicial Administration and the Status of Judges of the Republic of Belarus, Article 85.*

decisively suppressed through the application of measures stipulated by procedural law and/or through other forms of response as particular circumstances may so require.

The principle of impartiality in the Belarusian legal system is established by the above-mentioned plenary resolution of the Supreme Court and by the Judicial Code of Honour of the Republic of Belarus (Article 3). As explained by the Supreme Court, the judge must exercise tact, reserve and emotional balance, be attentive and objective, and refrain from demonstrating his/her likes or dislikes with regard to any participant of the judicial process, thus creating an atmosphere of confidence in the court apparent to all those in attendance (paragraph 8 of Resolution No. 14 adopted at the Plenary Session of the Supreme Court of the Republic of Belarus on 23 December 1999).

Therefore, at the level of principles, the independence of judges in Belarus is established in the Constitution and national legislation.

At the same time, it should be noted that internal legal regulations governing the appointment, tenure, promotion, removal and remuneration of judges do not generally conform to the standards which guarantee the judicial independence required to ensure the right of an individual to be tried by an independent court. This matter has been repeatedly raised in reports by international institutions.[22]

The state, however, is reluctant to acknowledge, neither locally nor internationally, that this problem does exist. For instance, to the recommendation, within the Universal Periodic Review, to improve the independence of the judiciary, Belarus replied that it had been implemented and that such independence is ensured at the legislative level. The Message on the Prospective Development of the Ordinary Court System in the Republic of Belarus (approved by Presidential Order No. 454 dated 10 October 2011) insists that *"there no systemic problems in the activity of the courts."*[23]

At the same time, regardless of the guarantees for the independence of judges in the Constitution and other legislative acts related to the criminal justice system, the executive branch, via the Presidential Administration and the Ministry of Justice, has significant leverage to control various spheres of the judiciary.

During the selection process, candidates for judicial office are put on the so-called "reserve list." Listed candidates are thoroughly examined by the head of the respective regional department of justice (a body of the executive) together with the chairman of the court which has a vacant position. Any competition of applications does not exist, and none of the candidates may be nominated as such without prior consent from the executive. This procedure gives room to a certain degree of arbitrariness and intervention in the selection process by the executive and, thus, falls short of international standards.

Candidates for judicial positions are proposed by the Minister of Justice jointly with the Chairman of the Supreme Court. Candidates are appointed to judicial office by the President of Belarus who has exclusive powers and discretion to approve or reject any proposed candidature without explanation.

The fact that the both authorities in charge of proposing a candidate are themselves appointed by the President, combined with the fact that the final approval of the candidate is also made by the President, altogether mean that the President has the total control over all aspects of the appointment of judges. This role of the President is incompatible with the judicial independence concept.

22 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 201, paragraph 98. // http://www.osce.org/odihr/84873

23 Presidential Order No. 454 dated 10 October 2011 (as amended on 30.12.2011) "On Measures to Improve the Activity of Ordinary Courts in the Republic of Belarus (together with the Message on the Prospective Development of the Ordinary Court System in the Republic of Belarus)" // Consultant plus: Belarus [electronic resource] / OOO YurSpektr, Minsk, 2012.

According to the Code of Judicial Administration and the Status of Judges, a judge is initially appointed for a fixed five-year term to be followed by an audit of his/her work when the term expires. After that, the judge may be either reappointed for another five years or granted life tenure (subject to mandatory retirement at the age specified for this particular civil servant category). The Code of Judicial Administration and the Status of Judges does not provide any criteria justifying the appointment of a judge for life instead of a fixed-term (i.e. temporary) appointment.

The UN Basic Principles on the Independence of the Judiciary criticize temporary appointments of judges (Principle 18). The problem of a temporary tenure (a kind of probation period) is that it provides a lower threshold for dismissal or reappointment for another term as compared to judges appointed for life. The lack of definite criteria to guide decisions on judicial appointments, in its essence, passes the career of a judge over into the hands of the executive branch. Moreover, those judges who are reappointed for another five-year term remain up in the air regarding their further job perspectives.

During the trial monitoring, the OSCE/ODIHR sought to receive information about the term of office for each of the judges who presided over the monitored court proceedings. However, despite written requests to the Supreme Court and the Ministry of Justice, that information was not provided.

The Code of Judicial Administration and the Status of Judges (Article 124) determines reasons for the dismissal of a judge. Most of the specified grounds, such as reaching the age limit for public servants, retirement of one's own accord, incapacity or death, are in compliance with international norms. At the same time, the provision of this Code allowing the President to institute disciplinary proceedings against judges (Article 115) and impose *"any disciplinary reprimand on any judge without instituting disciplinary proceedings"* (Article 122) contradicts international standards of the judicial independence.

Matters of remuneration to judges, including their salaries, bonuses and benefits, are regulated by the Presidential Administration. This financial control of the remuneration encourages the dependence of judicial officials on the Presidential Administration.

Other benefits, including the right to improve housing conditions and receive subsidized loans for that purpose, also submit judges to the will of the executive. As these benefits are distributed by local bodies of the executive branch, there is a clear possibility to exert unlawful pressure on the judiciary.

Another violation of the judicial independence principle arises out of the creation of hierarchical relations between judges belonging to the lowest instance and those of the next, higher one. The so-called *"zonal principle"* includes an element of oversight which influences decisions regarding the professional evaluation of a judge and his/her further advancement. Such hierarchical judicial system where lower-instance court judges are subordinated to judges from higher-instance courts comes into contradiction with the principle prescribing that judges only abide by the law. Here, international standards are not met as well.

Criminal cases are allocated to particular judges by the chairman of the respective court. The chair has full discretion to allocate cases on such grounds as workload, experience and qualifications of this or that judge. This system does not comply with the international standard requiring that the distribution of cases must exclude any impact by any party of the case or by any persons interested in its outcome. The European practice prefers a system where cases are allocated on a random basis.[24] As it may be understood, such powers of the chair are connected with a risk of violation of the judicial independence principle and abidance of judges only by the law.

24 Report on the Independence of the Judicial System Part I: The Independence of Judges (adopted by the Venice Commission at its 82nd Plenary Session, Venice, 12-13 March 2010). CDL-AD(2010)004. // http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.asp

The monitoring of the court trials related to the 19 December 2010 events revealed a number of problems with respect to the judicial independence.

It should be noted that, according to the UN Special Rapporteur on the independence of judges and lawyers, the judicial system in Belarus is not in fact independent as the executive power represented by the Presidential Administration and the Ministry of Justice has substantial possibilities to influence the judiciary.[25]

For instance, according to respective articles of the Code of Judicial Administration and the Status of Judges, appointments to judicial office are made by the President of the Republic of Belarus; the President may impose *"any disciplinary reprimand on any judge without instituting disciplinary proceedings"* and has the discretionary right to dismiss any judge.

In practice, judges do not value the principle of their independence and their own role in its implementation and demonstrate not only indifference to it or lack of understanding but also their dependence on the opinions expressed by bodies of the executive.

As an example, the Belarusian head of state[26] and the Minister of the Interior,[27] giving their accounts of the 19 December 2010 events, had repeatedly stated, well before the sentences on criminal cases under Article 293 of the Criminal Code were imposed, that what happened on 19 December 2010 in Minsk was nothing but mass disorders in spite of the fact that "mass disorders" is an element of a crime and that the determination of its occurrence in Minsk was to be subject to court proceedings.

During his press conference on 20 December 2010, the President expressed his opinion of the events that happened in Minsk on 19 December 2010 following the presidential election. According to him, representatives of the political opposition *"violated the law"* and it was *"banditry."*[28] In his speech, the President, when talking about the role of presidential candidates in the events, listed crimes they allegedly committed.[29]

The Ministry of Justice also gave its preliminary assessment of the case. As reported in a publication on the Ministry's official website, *"at its collegiate meeting, the Ministry of Justice also considered the activity of certain lawyers defending persons who participated on 19-20 December 2010 in actions aimed to arrange mass disorders."*[30] As a result, when hearing the cases on the charges related to the participation in the 19 December events, Belarusian courts showed that their decisions depended on opinions expressed by top-rank state officials and ruled in favour of conviction in all the cases.

Moreover, three political opponents of the incumbent — presidential candidates — received lengthy sentences of incarceration.[31]

In most of the trials, the court demonstrated a biased and prejudiced attitude towards the accused and was not perceived as impartial by those present in the courtroom. For instance, the court afforded making critical remarks that evidenced the court's explicit lack of confidence in testimonies by the defendants or witnesses for the defence; the court always declined reasonable motions by the defence etc.

25 Report of the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, 2001. // http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/110/54/PDF/G0111054.pdf?OpenElement

26 http://charter97.org/ru/news/2010/12/30/34950/;

27 http://newsby.org/by/2010/12/22/text17571.htm;

28 Belarusian Telegraph Agency, 20 December 2010: http://www.belta.by/ru/all_news/president/ Lukashenko-dejstvija-oppozitsii-vecherom-19-dekabrja-v-Minske-banditizm-a-ne-demokratija_i_536590.html

29 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011, paragraph 151. // http://www.osce.org/odihr/84873

30 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011, paragraph 153. // http://www.osce.org/odihr/84873

31 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011, Annex 1. // http://www.osce.org/odihr/84873

The fact that officials from the Ministry of the Interior and KGB were present in the courtroom might also make its impact on the judges and lawyers and on the examination of the cases as a whole. The way many of the judges behaved may be interpreted as a reflection of a prosecutorial bias.

During the trials, representatives of the executive branch were participating in the everyday activity of the court, which may be regarded as unlawful interference in the judicial independence. Special-purpose policemen in camouflage (SWAT) could often been seen in courthouse corridors. Their role was unclear. Perhaps, they assisted the courthouse's permanent guards to ensure security. They also probably took part in making video records of the court hearings. During a break in one of the court hearings, a camouflaged SWAT policeman entered the room located right behind the judge's desk (the room for the court's deliberations in private) and had not left it on that day until the hearings were over.

It should be noted that the courts widely practiced some unusual security measures. All visitors were subjected to frisking including their personal belongings. What was different from similar practices in other countries is that personal identity documents were to be produced upon entry and visitors' names were put on record. In all the courts, such records were made by plainclothes people wearing no identification whatsoever. According to OSCE/ODIHR observers, in some cases they did not look like permanent staff members of the court.[32]

At some court hearings, a video record of each visitor entering the courtroom was made at the time when the visitor was undergoing the second frisk. Notably, only those who came to attend hearings of the cases related to the 19 December events were put on video record; no attention was paid to visitors of other court hearings going on in parallel in other courtrooms.

In many cases, several law enforcers, who had entered in advance of the visitors, were present in the courtroom. Unmistakably identifiable by their distinctive appearance, those people spread throughout the courtroom in a way giving rise to a suspicion that they were in charge of eavesdropping on other visitors' conversations and watching them. This explicit presence of representatives of the executive branch of power intruding into the matters of justice may be regarded as intimidation, if not unvarnished interference.[33]

Another indicator of relations between judges and security staff is their interaction with permanent courthouse guards easily identifiable by their uniform. 4 to 8 of them patrolled public places and the front part of the courtroom where they guarded the defendants kept in the cage. Their task inter alia was to ensure strict observance of the rules by the public. Once, during the hearing, a guard made an instruction to the judge in front of all those present, saying, "Remind the public of the rules!" The judge obeyed accordingly. While courthouse guards are tasked to settle security-related incidents, it is the judge who is in charge of maintaining order and making respective decisions, not a guard. Any assumption of this role by the security staff is an infringement on the independence of the judiciary.

The third sphere, which raises concerns about the courts' impartiality, refers to decisions taken by some judges. In the course of the criminal trials, the both parties regularly made motions to the court requesting, for instance, to invite a witness or enter a proof into the case file, to accept or reject a proof, to change the pre-trial restraint measure, to make a break or change the sequence of the hearing etc.

In all the trials, the judges accepted the total of 117 motions and objections against the defence. 14 decisions were taken against the prosecution. Only two motions from

32 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011, paragraph 97. // http://www.osce.org/odihr/84873

33 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011, paragraph 99. // http://www.osce.org/odihr/84873

the prosecution requesting to enter a proof into the case file were declined in all the trials.[34] 35 All the defence's objections against proofs submitted by the prosecution (e.g. against entering records of wiretapped telephone conversations or video records into the file) were declined.

The courts gave grounds for less than a half of their decisions on a motion or proposal. Even when the judges withdrew into the deliberations room to think over an important motion, when back, they just pronounced the result, not the grounds for the decision taken.

Another form of the court's prosecutorial bias was demonstrated in the process of making decisions as to whether a particular proof was relevant to the case. The prosecution was allowed entering a plentiful of proofs into the case file, although those proofs should have been evaluated as irrelevant.

The manner of communication with those present in the courtroom also reflects the court's partiality and bias in favour of the prosecution. Quite often the judges were keen on asking additional questions to those witnesses and aggrieved persons who supported a version by the prosecution or disproved a version by the defence.

The questions asked by the judge to defendant Sekret can be drawn as an example: *"Why in your opinion did the police appear at the place of the events? Do you think that this place is appropriate for acts of hooliganism? Did you commit hooliganism? These acts of hooliganism are evident and you know it very well. You knew where you were, and you broke windows. Did you understand, if the event was unsanctioned, which consequences it would lead to and who stood behind that event?"*[35]

Another tendency that may be regarded as a potential indicator of the judges' prosecutorial bias was reflected in the imposition of sentences. As the analysis of the sentences shows, almost in every case the defendant received either the very same sentence which was demanded by the prosecution or approx. 75 per cent of what had been asked by the prosecutor.

Of special notice is unexplainable inconsistency in the determination of punishment. On the one hand, the judges imposed a number of sentences stipulating punishment blow the lower limit specified by law. For instance, defendants Medved and Pozniak and Russian citizens Breus and Gaponov were convicted of participation in mass disorders under Article 293 of the Criminal Code and sentenced to those types of punishment which do not require deprivation of liberty: Medved received three years of restrained liberty, Pozniak was sentenced to two years of suspended imprisonment, and Breus and Gaponov were only fined.

On the other hand, there were other persons convicted under Article 293 of the Criminal Code, i.e. in fact of the same crime, namely Mirzoyanov, Kirkevich and several other people. They were sentenced to punishments ranging from three and a half to four years' imprisonment in a strict-security correction facility. It should be noted that those were exactly the types of punishment requested by the prosecutors during the debates.

Other examples of prejudice and prosecutorial bias that occurred in the course of the criminal trials deserve separate emphasis.

During the hearing of an appeal filed by a presidential candidate, when the lawyer was reading the defence's comments and remarks, one of the judges was from time to time stealing a glance on the prosecutor and rolling her eyes. In the course of the hearing, almost each time when the judges were leaving the courtroom to deliberate over a motion, the prosecutor stood up and also left the courtroom through the same door. The prosecu-

34 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011. // http://www.osce.org/odihr/84873

35 Transcript of the court session on the case against Loban, Sekret et al, 5 May 2011.

tor came back to the courtroom immediately prior to the judges' return. Contrastingly, the defence lawyers always remained in the courtroom. At many court hearings the prosecutor was seated closer to the judge than the court secretary was. The lack of impartiality was demonstrated in first-instance courts as well. Some judges could afford derogative treatment of the parties, especially of the defendant and his/her defence lawyer.

As was noticeable, special attention was paid to proofs in support of a particular position: additional or suggestive questions were put to certain witnesses (more often to those supporting the prosecution's perspective), while other witnesses' testimonies were ignored — even where the court deigned to hear them, it was done perfunctorily, and such witnesses' explanations would often be interrupted and questions to them dismissed as not relevant to the case. Based on that, professional participants in the trial and the public in the courtroom almost always was able to make the right conclusion as to which of the testimonies would be taken as a basis for the court's subsequent judgements.

In the sentences, the courts also demonstrated their unequal attitude towards different evidence by thoroughly detailing the proofs of guilt while leaving other important aspects without assessment or paying no attention to the evidence from the defence at all.

For example, as is revealed by the study of the sentences imposed on the participants of the events of 19 December 2010 in Minsk, the courts gave a detailed account of testimonies by the aggrieved persons, the policemen, some of which were not even interrogated in court; however, their testimonies perfectly matched the charges. At the same time, testimonies by witnesses for the defence who were interrogated in court in every detail and within a long period of time were summarized in an extremely contracted form, with some essential aspects being left by the court totally unanalyzed.

The OSCE trial monitoring showed that in a number of cases the work of the judicial system gave reasons to doubt its impartiality. In light of the systemic influence exerted on the judiciary by the executive branch through the head of state and the Presidential Administration, it becomes clear why judges refrain from taking decisions that would contradict the Administration's will.

Moreover, the assessment of the situation regarding the 19 December 2010 events allows pointing out that the authorities demonstrated unequal attitude towards various participants of the unsanctioned rally. According to varying estimates by human rights defenders, the total of 10 to 30 thousand people took part in the meeting in October Square, the march along Independence Avenue to Independence Square and the rally in Independence Square. However, only 53 persons, 34 of which are presidential candidates, public and political activists and participants in the opposition candidates' election activities, were criminally charged of participation in (or arrangement of) mass disorders or participation in (or arrangement of) group actions gravely violating public order. During the election campaign, the above-mentioned persons strongly criticized the exiting regime and the incumbent head of state. Their active stance regarding many aspects of the country's social and political life probably became the actual reason for their criminal prosecution and subsequent conviction.

Evidently, the criminal repressions for the participation in the rally at October and Independence Squares and the march through Independence Avenue were first and foremost targeted against political activists and opponents to the current regime.

3.2.2. Independence of Lawyers

Lawyers play a fundamental role in the establishment and maintenance of the rule of law and the protection of human rights. The main documents which lay down international regulations for the legal profession are the European Convention for the Protection of Human Rights and Fundamental Freedoms, Recommendation Rec(2000)21 of the Committee

of Ministers to member states [of the Council of Europe] on the freedom of exercise of the profession of lawyer (adopted by the Committee of Ministers on 25 October 2000),[36] and Basic Principles on the Role of Lawyers (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990).[37]

According to international standards covering the independence of lawyers, each person accused of a criminally punishable offence has the right to legal assistance and defence. The state must guarantee the independence of the legal profession and provide necessary conditions for lawyers to discharge their professional functions.

Persons charged with committing a crime must be in all cases represented by a lawyer which will ensure the right to fair examination of the case by an independent and impartial court throughout the entire process, except for the cases when such persons wish to defend themselves. For legal assistance to be efficient, it must be independent. International law established specific guarantees aimed to provide independence both to individual lawyers and to the legal profession as a whole.

Everyone has the right to legal assistance by a lawyer of his/her own choice to protect his/her rights in all stages of criminal proceedings. States must ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction or under their effective control, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

States must ensure that:

- all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence;
- all persons arrested or detained, with or without criminal charge, have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention;
- persons charged with a criminal offence may be represented by a lawyer in any case and in all stages of criminal proceedings; and
- any such persons who do not have a lawyer may, in all cases in which the interests of justice so require, are entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

States must guarantee that

- lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- where the security of lawyers is threatened as a result of discharging their functions, they are adequately safeguarded by the authorities;
- lawyers are able to travel and to consult with their clients freely both within their own country and abroad;
- lawyers do not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics;

36 Recommendation Rec(2000)21 of the Committee of Ministers of the Council of Europe to member states on the freedom of exercise of the profession of lawyer (adopted by the Committee of Ministers on 25 October 2000) // http://www.advokatsamfundet.dk/Advokatregulering/ReglerOgVedtaegter/~/media/Alle%20regler/25102000%20COUNCIL%20OF%20EUROPE.ashx

37 UN Basic Principles on the Role of Lawyers (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) // http://www2.ohchr.org/english/law/lawyers.htm

- all communications and consultations between lawyers and their clients within their professional relationship are confidential; and
- lawyers are not identified with their clients or their clients' causes as a result of discharging their functions.

Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

The basic duties of lawyers with respect to their clients mostly include:

- advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
- assisting clients in every appropriate way, and taking legal action to protect their interests; and
- assisting clients before courts, tribunals or administrative authorities, where appropriate.

Lawyers, in protecting the rights of their clients and in promoting the cause of justice, should seek to uphold human rights and fundamental freedoms recognized by national and international law and should at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

According to Article 62 of the Constitution of the Republic of Belarus, everyone has the right to resort to legal assistance in order to exercise and protect his/her rights and freedoms including the right to use, at any time, the assistance of lawyers and other representatives before courts, other authorities, institutions and organizations, and in relations with officials and citizens. It is prohibited in Belarus to hinder the provision of legal assistance. According to Article 1, Part 1 of the Law on the Advocacy and the Activity of Lawyers, the advocacy is a legal institute intended to provide, in accordance with the Constitution of the Republic of Belarus, professional legal assistance to establish and protect rights, freedoms and interests of individuals and legal entities. The advocacy's basic tasks are to provide, on a professional basis, legal assistance to clients to establish and protect their rights, freedoms and interests and to take part in legal education of citizens (Article 6 of the Advocacy Law).

The principle of the lawyer's independence is a component of the constitutional right of Belarusian citizens to legal assistance. This principle is also specified in the Law on the Advocacy and the Activity of Lawyers (Article 4).

According to the UN Basic Principles on the Role of Lawyers, several fundamental components of the lawyers' independence can be identified. They are:

- indiscriminate access to legal education and the provision of appropriate qualification and training in law;
- indiscriminate access to the legal profession; decisions to permit entry into legal practice or membership in a professional association are to be taken by an independent body; such decisions are to be subject to judicial control;
- improvement of lawyers' professional qualifications including in the sphere of human rights and fundamental freedoms accepted by national and international law;
- freedom of lawyers to perform professional functions without intimidation, hindrance, harassment or improper interference; unrestricted communication with their clients; freedom from persecution for discharging their professional functions; lawyers' freedom of expression, association and assembly;
- independence of lawyers' professional associations;
- adoption of professional ethics by the legal community itself; and fairness of disciplinary proceedings against lawyers; such proceedings are to be brought before an

independent authority and subjected to independent judicial review.

When visiting Belarus in 2000, the UN Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy, arrived at the conclusion that the executive branch of power exercises excessive control over the lawyers. Such control undermines the core values of an independent legal profession and the Basic Principles on the Role of Lawyers. Such control leads to abuses that result in allegations of harassment, intimidation and interference by the executive.[38]

In 2011, after having considered Belarus' fourth periodic report, the UN Committee against Torture noted in its concluding observations a number of issues of special concern. They are widespread cases when the right to immediate access to lawyers is violated and intimidation of lawyers and interference in the discharge of their professional functions takes place. The Committee expressed concern that the bar associations, though independent by law, in practice are subordinate to the Ministry of Justice.[39] Also, in 2011 the UN Human Rights Council adopted a resolution on human rights in Belarus noting deterioration in the situation of human rights in Belarus following the presidential election on 19 December 2010, in particular the increasing pressure on lawyers.[40]

In Belarus, the most typical challenge to the independence of the advocacy, i.e. to the freedom to exercise the legal profession, is the interference in the activity of lawyers by a body of the executive, the Ministry of Justice, with such interference being established by law. Access to legal profession is fully administered by the Ministry of Justice, not the legal community itself. The representation of lawyers in the Qualification Board is not overwhelming. De facto, the Qualification Board is subordinate to a body of the executive. Applicants for advocacy licences are required to undergo a mandatory interview which has no clearly specified assessment criteria. This gives the Qualification Board wide discretional powers in decisions over passing or failing the examination procedures. The restriction of the advocacy licence validity to a limited period of time and the ensuing necessity to apply to a body of the executive for its further extension as well as the opportunity to hold extraordinary qualification examinations of lawyers as may be requested by the Ministry of Justice form a mechanism of influence by the executive on the independence of each particular lawyer. Thus, it can be concluded that the legislation and law-applying practices in Belarus regulating access to the legal profession do not conform to international standards of the lawyers' independence.

Moreover, Article 38 of the Law on the Advocacy and the Activity of Lawyers adopted in 2011 provides for substantially broad powers of the Ministry of Justice with regard to the legal profession, such as: regulation of the activity of the legal profession; control over such activity; receipt of data and documents related to the activity of the legal profession from bar associations, legal counsel offices, advocates' offices and individual lawyers; right to make proposals to a bar association to bring lawyers to disciplinary liability; suspension of a lawyer's right to discharge professional functions for the period of disciplinary proceedings against him/her in case they are instituted by the Ministry of Justice; right to make proposals to the Qualification Board to hold an extraordinary qualification examination with respect to a particular lawyer to decide whether he/she is further authorized to discharge his/her professional functions; establishment of the procedures for the qualification examination of lawyers, and other powers.

38 Report of the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, , 2001. // http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/110/54/PDF/G0111054.pdf?OpenElement

39 Concluding Observations of the Committee against Torture: Belarus, 2011, sub-paragraph 6.12. // http://www.unhcr.org/refworld/topic,4565c225e,4565c25f16d,4f1d51c82,0,,,BLR.html

40 UN Human Rights Council Resolution A/HRS/RES/17/24 of 14 July 2011 on the situation of human rights in Belarus. // http://www2.ohchr.org/english/bodies/hrcouncil/17session/docs/A-HRC-RES-17-24.pdf

In practice, the problem of interference into the activity of the advocacy in general and individual lawyers in particular became especially acute after the events of 19 December 2010.

As an example, the official website of the Belarusian Ministry of Justice published information on 29 December 2010 insisting that some lawyers defending persons who participated on 19-20 December 2010 "in actions aimed to the arrangement of mass disorders" were gravely violating the Rules of Lawyers' Professional Ethics and effective laws including the Advocacy Law. It was stated that those lawyers, by abusing their right to defend other persons, misrepresented information about the course of investigation and the possibility for their clients to exercise their right to legal assistance and about their clients' health and conditions of detention as well as disseminated biased information about the work of the country's law enforcement agencies. In this regard, the Ministry of Justice demanded immediate action from the Minsk City Bar Association. The Ministry also made a check of the facts it had itself alleged which resulted in measures of response stipulated by the national legislation.[41] In particular, 5 lawyers received letters of warning which were later used as grounds for the termination of their licences.

It should be noted that in January-February 2011 lawyers received letters of warning from the Ministry of Justice for their statements which were true and objectively described gravest violations of their clients' rights. Moreover, the lawyers resorted to the mass media only after the respective complaints had been filed with the prosecuting authorities and failed to be adequately responded by the state. The lawyers' media statements intended to attract attention to violations committed by criminal prosecution agencies and were made in their clients' interests, also satisfying reasonable public interest to the criminal cases in question. However, the Ministry of Justice evaluated those statements as unreasonably negative assessments of the work of state agencies contradicting with the Advocacy Law. That unlawful interference in the activity of the advocacy has had a detrimental effect on other lawyers who, fearing to lose their licences, refrain from open negative remarks with respect to any actions by state agencies and officials. This undoubtedly diminishes the efficiency of human rights defence and does not serve to the very purpose of justice.

At the same time, the Presidium of the Minsk City Bar Association did not find any facts of violation in actions of their colleagues and declined the request of the Ministry of Justice to institute disciplinary proceedings. Thus, at that stage, the Presidium of the Minsk City Bar Association refused to support the Ministry's position and stood up for their lawyers. The refusal to apply disciplinary sanctions to lawyers as demanded by the Ministry of Justice was an unprecedented decision in the history of the Belarusian advocacy.

In the above-mentioned period and also in view of the subsequent interference by the state in the activity of lawyers, the Belarusian advocacy received support from national human rights defending organizations and civil society activists.

On 12 January 2011, the Belarusian Helsinki Committee (BHC), a human rights defending NGO, sent a letter to the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, describing actions by the Ministry of Justice against lawyers.[42]

Following that, on 12 January 2011, the Ministry of Justice made a statement on its website whereby it assessed the BHC information as *"failing to objectively cover the work of state and law enforcement agencies to maintain stability and legal order in the republic, purposefully misrepresenting the actual situation in the country and attempting to discredit the Republic of Belarus in the eyes of the international community."* The Ministry issued a written warning to the BHC[43] which, according to the Law on Public Associations, gives the

41 http://www.minjust.by/ru/site_menu/news?id=734

42 http://belhelcom.org/?q=ru/node/7425

43 http://www.minjust.by/ru/site_menu/news?id=744

Ministry the right to apply to court and request that the NGO be suspended and subsequently removed.[44] The BHC lodged an appeal with the Supreme Court challenging the written warning by the Ministry of Justice. However, the court assessed the actions by the state body as lawful.

A number of human rights defending organizations, such as the Legal Transformation Center (Olga Smolianko, Elena Tonkacheva), Human Rights Center (Raisa Mihailovskaya), Human Rights Center "Viasna" (Ales Beliatsky), Belarusian Human Rights House (Tatiana Reviaka), Committee for the Protection of the Repressed "Salidarnosc" (Enira Bronitskaya), Belarusian Helsinki Committee (Oleg Gulak) and B. Zvoskov, a human rights defender and graduate of the first international higher course in human rights by the Polish Helsinki Committee, repeatedly applied to the UN Special Rapporteur on the independence of judges and lawyers in 2011 and 2012 in view of the ongoing pressure on the Belarusian legal profession.

International human rights defending institutions, lawyers' communities and international NGOs also expressed their solidarity with the Belarusian advocacy. The International Commission of Jurists, partners of the Human Rights Houses network, the Human Rights Commission under the Supreme Council of the Polish Bar Chamber, the Bar Union of Moldova, the International Monitoring Mission of the Committee on International Control over the Human Rights Situation in Belarus, the European Criminal Bar Association (ECBA), and the Council of Bars and Law Societies of Europe forwarded statements and complaints to the Ministry of Justice and the chair of the Qualification Board expressing their concern about the increasing number of occasions of pressure and persecution against lawyers in Belarus following the suppression of the protests against the results of the presidential election in December 2010.

After the Minsk City Bar Association (MCBA) twice refused to institute disciplinary proceedings as demanded by the Ministry of Justice, the latter turned to a large-scale audit of all MCBA lawyers and legal counsel offices as a means to exert pressure on the MCBA.

As a result of the audit, which had been made upon request from the State Security Committee (KGB) of Belarus, the Ministry of Justice, based on the decision by the Qualification Board, canceled advocacy licences of four lawyers whose clients were defendants in the case of mass disorders on 19 December 2010: V. Tolstik and T. Goraeva defended I. Halip, O. Ageev's client was presidential candidate A. Mihalevich, and T. Ageyeva participated as lawyer in pre-trial investigative activities against A. Mihalevich's election headquarters coordinator. At the same time, according to the chairman of the Minsk City Bar Association A. Pylchenko, there were no disciplinary proceedings instituted against those lawyers as the Ministry of Justice had made no such requests to the MCBA regarding the lawyers' professional activity.[45]

On 4 March 2011, upon request by the Ministry of Justice, the Presidium of the Minsk City Bar Association decided to terminate P. Sapelko's membership in the MCBA.[46] His *"violations"*, as stated on the Ministry's official website, *"took form of nonappearance when summoned by the body in charge of the criminal process to participate in an investigative action under criminal case and failure to provide defence to the accused."*[47]

Within a short period of time, three members of that Presidium of the Minsk City Bar Association which in January declined the Ministry's demand to impose disciplinary liability

44 *Concluding Observations of the Committee against Torture: Belarus, 2011, sub-paragraph 6.12. // http://www.unhcr.org/refworld/topic,4565c225e,4565c25f16d,4f1d51c82,0,,,BLR.html*

45 *http://charter97.org/ru/news/2011/2/25/36350/*

46 *http://minjust.by/ru/site_menu/news?id=812*

47 *http://spring96.org/ru/news/45589*

on the lawyers for their mass media statements, T. Ageyeva, O. Ageev and P. Sapelko, were deprived not only of their membership on the Presidium but of their advocacy status as well.

Following the withdrawal of licences from the four lawyers by the Ministry of Justice and the latter's initiative to develop and adopt new Rules of Lawyers' Professional Ethics, A. Pylchenko stated in his interview to *BelaPAN* on 18 February 2010 that all the management of the Minsk City Bar Association regarded the then current situation as critical and truly threatening the independence of the entire advocacy as a legal institute as well as the independence of individual lawyers.[48] On the same day, 18 February 2011, the Minister of Justice issued Order No. 36 whereby expelling A. Pylchenko from the Lawyers Qualification Board.

On 31 August 2011, the Ministry of Justice made a proposal demanding premature termination of office for the then chairman of the Minsk City Bar Association Aleksandr Pylchenko. As decided by the general meeting of the MCBA members, on 22 October 2011 he was removed from office and a new chairman was elected, A. Sankovich, who had defended D. Novik, an accused person in a case related to the 19 December 2010 events in Minsk. On 24 October, the Ministry suspended and later canceled the MCBA general meeting decision in its part related to the election of A. Sankovich as the MCBA chair.

Supervisory functions of the Ministry of Justice with regard to the advocacy, i.e. auditing of lawyers and their associations by the Ministry, should be viewed as another example of unreasonable interference in the activity of lawyers. The respective powers are given to the Ministry by the Law on the Advocacy and the Activity of Lawyers in contrast to international standards prohibiting interference in the activity of lawyers which should enjoy independence. Moreover, the Ministry of Justice practices an arbitrary approach to the selection of lawyers to be subjected to audit. For instance, in 2011, some lawyers on the Ministry's list of lawyers to be audited underwent four audits in a row. A look on the list of the lawyers subjected to audit allows making a conclusion that it includes almost all the lawyers who defended participants of the 19 December 2010 events, i.e. who acted as the defence in the politically motivated cases. Such an approach practiced by the Ministry may be viewed as associating lawyers with their clients and/or clients' causes.

The audits resulted for some lawyers in the termination of their licences by the Ministry of Justice. Other audited lawyers experienced difficulties in passing subsequent qualification examinations and/or received letters of warning from the Ministry which are, in fact, the first stage on the way to possible subsequent deprivation of the advocacy licence. There were cases when lawyers, after having received a letter of warning from the Ministry of Justice, were made to leave the bar "on their own accord."

On 26 July 2011 A. Bahtina, the lawyer of I. Halip, and D. Lipkina who defended N. Lihovid did not pass the extraordinary qualification examination initiated by the Ministry of Justice. The reasons for disqualifying A. Bahtina were stated as "violations in the advocacy activity and of the professional ethics as well as poor promotion of law among the public." Lawyer A. Burak who provided legal assistance to defendants in the same case, A. Lebedko and A. Klaskovsky, appeared in a similar situation.

On 30 August 2011, the Ministry of Justice again resorted to the licence withdrawal procedure through the respective decision by the Qualification Board. That time T. Sidorenko was disbarred. She defended former presidential candidate Nekliaev and another candidate, A. Mihalevich, after his defender O. Ageev had been disbarred.

All lawyers who lost their licences acted as defenders in the criminal trials related to the events of 19 December 2010. It should be noted that the violations "exposed" by the

48 *http://news.date.bs/society_222062.html*

Ministry in the course of auditing those lawyers' internal records were technical, i.e. had to do with document management, and in no case had any relation to the discharge of direct professional duties, i.e. defending rights and legal interests of individuals, and did not compromise the quality of legal assistance provided. The reasons behind the decision to withdraw the right to advocacy from those lawyers were perfunctory. The licences were terminated in violation of the legally established procedure; no account was taken of the lawyers' professional qualities and their exclusively positive track records as well as of the absence of any implications resulting from the *"detected cases of misconduct."*

On 6 March 2012, the Presidium of the Minsk City Bar Association, as requested by the Ministry of Justice, decided to expel A. Varvashevich from the MCBA for *"misconduct incompatible with the title of lawyer."* [49] A. Varvashevich together with lawyer M. Kovalevskaya defended former presidential candidate A. Sannikov under the criminal case related to the events of 19 December 2010 (after their predecessor, lawyer P. Sapelko, had been expelled from the MCBA) and later actively protected A. Sannikov's interests.

All the lawyers who had been deprived of their advocacy licences sued the Ministry of Justice, but the courts supported the position of the state body. Despite the fact that the lawsuits had not yet been heard or court decisions had not yet come into force, on 4 April 2011 Minister of Justice V. Golovanov informed journalists that the court of first instance had supported the Ministry in the matter of withdrawal of advocacy licences from a number of lawyers.[50]

The above-mentioned examples make it possible to conclude that this body of the executive "punished" undesirable lawyers who assisted defendants in "political" cases.

The procedure of withdrawing advocacy licences, as applied by the Ministry of Justice, aimed to intimidate the entire law community so that lawyers would fear to take on any such case at all. It should be stressed that the target has been reached.

As specified in paragraph 26 of the Basic Principles on the Role of Lawyers, codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs or by legislation. The Law on the Advocacy and the Activity of Lawyers, in contrast to international standards, assigns the development and approval of the Rules of Lawyers' Professional Ethics to the competence of the Ministry of Justice.

On 6 April 2012 the Ministry of Justice, by Resolution No. 39, approved new Rules of Lawyers' Professional Ethics. The Rules insist in their text that they are *inter alia* based on international standards and rules of the legal profession. At the same time, the very fact that a body of the executive develops the Rules of Lawyers' Professional Ethics comes into serious contradiction with international standards.

Other examples of interference in the activity of lawyers and the Bar are Order No. 90, On the Participation of Lawyers in Educational Events outside the Republic of Belarus, issued by the Ministry of Justice on 15 April 2011, whereby bar associations are instructed to *"ensure that lawyers may leave to participate in educational events outside the Republic of Belarus only if so approved by the presidium of the respective bar association,"* and Order No. 135 dd. 30 May 2011 by the Ministry of Justice demanding an extraordinary qualification examination of lawyers which was held between 15 June and 15 September 2011.

Additionally, it should be stressed that the freedom of expression, guaranteed by Article 33 of the Constitution of the Republic of Belarus, was violated with respect to Belarusian lawyers. Notably, in contrast to the Law of 1993, the new Law on the Advocacy and the Activity of Lawyers of 2011 no longer contains the concept of the freedom of expression for lawyers.

49 http://charter97.org/ru/news/2012/3/11/49100/

50 http://get-newz.com/society/43927-sud-podderzhal-poziciju-minjusta-po.html

In January 2012 Letter No. 01-25/488, On Lawyers' Interviews to the Mass Media, from the chairman of the National Bar Association V. Chaichits, was circulated among regional bar associations and the Minsk City Bar Association. The letter recommends that lawyers should receive prior consent for mass media interviews from heads of legal counsel offices or bar chairpersons or their deputies. Deputy chairpersons of bar associations are obliged to examine lawyers' interviews as they appear in media outlets and forward them to the National Bar Association.[51]

This letter caused negative response from human rights defenders. Various websites published statements saying that this initiative by the NBA head went beyond the generally accepted perception of the Ministry of Justice as the only one to blame in all problems the Belarusian legal profession had. Lawyers in those circumstances appeared as victims of repressions and persecution, including for interviews and publications in the media. As it turned out, lawyers could have their mouths shut without any interference from the Ministry of Justice.[52]

It should be noted that the freedom of assembly, as it applies to lawyers as well, was also violated. For instance, on 4 January 2011 the Ministry of Justice supported the decision by the Qualification Board of 3 January 2011 to disbar V. Busko, a lawyer of the Grodno Regional Bar Association, for a violation of the effective legislation which took form of her participation in the unsanctioned rally on 19 December 2010.[53] The lawyer did participate in the unsanctioned peaceful event, but she committed no illegal acts. Anyway, she was brought to administrative liability for her participation in the unsanctioned mass event. Following that, the bar association decided to terminate her bar membership.

Attempts to seize lawyers' documents, including those which constitute lawyer's secret, by law enforcement agencies as well as cases of criminal prosecution of the lawyers who defended participants of the 19 December 2010 events should also be regarded as facts of interference in the activity of lawyers.

For example, when T. Ageyeva and O. Ageev filed a lawsuit complaining of the actions by the Ministry of Justice to terminate their advocacy licences, the State Security Committee (KGB) initiated the institution of a criminal case under Article 380, Part 2 of the Criminal Code (forgery) in connection with some technical breaches in the procedure of concluding legal assistance agreements. The instituted criminal case was connected with the lawyers' professional functions and related to the documents that constituted lawyer's secret. It may be safely assumed that the repressions against the Ageevs were caused by O. Ageev's refusal to provide the State Security Committee with information concerning his client, former presidential candidate A. Mihalevich. As O. Ageev told in his interview to the press office of the Belarusian Helsinki Committee, *"during all that a KGB officer talked to me thrice and quite straightforwardly offered "to provide assistance in the collection of evidence." All the three times I reacted quite starkly and also informed the superior bodies of possible malfeasance in office. Yet, I don't know the fate of this document."* The records of the criminal case against the Ageevs contain documents proving that in January-February 2011, when they worked as defenders in the 19 December cases, the KGB was carrying out investigative actions against the both lawyers. Moreover, those actions were carried out by the KGB officials who were members of the investigators' team working on their clients' cases.

Penal prosecution or threat of penal prosecution against lawyers contradicts paragraph 20 of the Basic Principles on the Role of Lawyers which specifies that *"lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral*

51 *http://news.tut.by/society/271612.html*

52 *http://platformarb.com/advokaty-sami-sebe-zatykayut-rty/*

53 *http://www.minjust.by/ru>./site_menu/news?id=734*

pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority."

The above-mentioned standard of international law implies that the main purpose of lawyers' professional associations is not to manage their activity but to protect lawyers' professional interests and improve their independence.

The problem is that, by law and in practice, Belarusian bar associations are not independent from the executive branch of power. It is vividly demonstrated by the powers of the Ministry of Justice with respect to lawyers, as they are established by the Law on the Advocacy and the Activity of Lawyers. These powers make the Bar managed and totally controlled by the Ministry.

As practice shows, the role of bar associations in the protection of their members' interests is, in contrast to international standards, replaced by a supervisory and regulatory one. The National Bar Association has no principled position with regard to the protection of interests of individual lawyers in particular and of the entire law community in general and therefore responds passively to the existing challenges on the part of the state.

As an example, on 26 October 2011 various websites informed that the Minsk City Bar Association refused to meet with the International Lawyers' Association. Comments were made in this regard that Belarusian bar leaders are totally controlled by the Ministry of Justice and that it was not the first time when they bar themselves from any international contacts whatsoever.[54]

As the analysis of the implementation of the lawyers' independence principle in Belarus shows, this principle fails to be observed either in the legislation or in the state's law-applying practices.

It can be concluded that Belarus has nonconformities with international standards regarding the activity of lawyers in the following spheres: access to the legal profession, improvement of professional qualification, freedom to discharge professional functions, independence of professional associations, the procedures for the adoption of the Rules of Lawyers' Professional Ethics, bringing to liability for violations of the advocacy-related legislation, and the lack of proper stance of bar associations in the protection of their members from prosecution and unlawful restrictions and intimidations from the Ministry of Justice, in the advocacy of the professional independence and in the improvement of the role of lawyers in the administration of justice.

The recent reform of the institute of advocacy in Belarus has not only failed to address the existing problem but also added to its aggravation. Article 1 of the new Law on the Advocacy and the Activity of Lawyers in the Republic of Belarus adopted in 2011, in contrast to the Advocacy Law of 1993, no longer contains provisions indicating that the advocacy is an independent legal institute. This fully reflects the actual position of the advocacy in Belarus.

3.2.3. Role of the Prosecutor

Persons in charge of the prosecution in court play a key role in the administration of justice. An accused person has the right to a court hearing with the participation of a fair and impartial prosecutor. According to the UN Guidelines on the Role of Prosecutors (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August — 7 September 1990), the prosecutors must perform their professional duties impartially and objectively and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.

54 http://udf.by/news/society/49098-minskaya-kollegiya-advokatov-otkazalas-ot-vstrechi-s-mezhdunarodnoy-associaciey-yuristov.html

In March 1998 PACE experts drafted for CE member states a recommendation, On the Role of Public Prosecution in the Criminal Justice System, whereby they attempted to shape basic outlines for the concept of prosecutorial activity in a democratic society.

This recommendation was embodied in subsequent documents adopted by the Parliamentary Assembly and Committee of Ministers of the Council of Europe and also served as basis for Recommendation Rec (2000)19, on the role of public prosecution in the criminal justice system, adopted by the CE Committee of Ministers on 6 October 2000. At present, the latter is the main framework document establishing fundamental principles for the organization and conduct of prosecuting authorities in CE member states.

For the public prosecutor to discharge his/her functions in a proper way, he/she requires full autonomy and independence from other branches of state power. In contrast to the requirements concerning judges, international law does not specify any norms that would guarantee institutional independence of prosecutors, as in some systems prosecutors are appointed by the executive power or accountable to it to a certain extent; this obliges them to obey certain instructions issued by representatives of the executive. An independent public prosecution body is more preferable as compared to a body accountable to the executive power. However, in any case, the state must provide guarantees enabling prosecutors to conduct investigations in an impartial and objective manner.

The office of prosecutors must be strictly separated from judicial functions.[55] Prosecutors must be able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

Prosecutors must perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.[56] Prosecutors must, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.[57]

In the performance of his/her duties, the prosecutor must:

- carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise; and
- consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights.[58]

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they must refuse to use such evidence against anyone other than those who used such

55 *UN Guidelines on the Role of Prosecutors (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990), paragraph 10. // http://www2.ohchr.org/english/law/prosecutors.htm*

56 *UN Guidelines on the Role of Prosecutors, paragraph 11. // http://www2.ohchr.org/english/law/prosecutors.htm*

57 *UN Guidelines on the Role of Prosecutors, paragraph 12. // http://www2.ohchr.org/english/law/prosecutors.htm*

58 *UN Guidelines on the Role of Prosecutors, paragraph 13. // http://www2.ohchr.org/english/law/prosecutors.htm*

methods, or inform the court accordingly, and must take all necessary steps to ensure that those responsible for using such methods are brought to justice.[59]

Disciplinary proceedings against prosecutors must guarantee an objective evaluation and decision. They must be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the UN Guidelines on the Role of Prosecutors.

In Belarus, prosecuting officials enjoy a special legal status other than that of judges. In addition to general laws governing the public service as a whole, their status is established by laws on the prosecution, regulations on the service in the prosecuting agencies and by other legal acts.

The main normative sources that define the concept of the prosecutor in the criminal process are the Code of Criminal Procedures and the Law on the Prosecutor's Office of the Republic of Belarus. The concept of the prosecutorial officer who acts in the capacity of the state prosecutor is regulated by a number of normative legal acts in Belarus, first of all, by Article 125, Part 2 of the Constitution establishing that the prosecutor's office supervises the observance of law in the investigation of crime, the conformity of court decisions on civil and criminal cases and on administrative offence cases with applicable laws; conducts, where required by law, pre-trial investigation and supports public prosecution in court. Also, the support of public prosecution in court is referred to in Article 34, Part 1 of the Code of Criminal Procedures. Article 6, paragraph 3, part 1 of the Code of Criminal Procedures gives a definition for the concept of public prosecutor. According to it, the public prosecutor is a prosecutorial official that supports the public prosecution and performs other procedural functions in the examination of a case by a court of first instance. The definition of the public prosecution is set forth in Article 46 of the Law on the Prosecutor's Office. Accordingly, the prosecutor, in the name of the state, conducts criminal prosecutions and supports the public prosecution in court acting in the capacity of the prosecution, i.e. the public (or state) prosecutor.

In a court trial on criminal cases, a prosecutorial official acts as the public prosecutor, thus, representing the interests of the state or society (public interests) violated by the crime. The charges the prosecutor supports in court are the state prosecution and the prosecutor is the state prosecutor as he/she discharges his/her functions in the name and on behalf of the state.

The participation of prosecutorial officials as public prosecutors in court hearings of criminal cases is a form of implementation of the prosecutor's functions in the criminal prosecution and is the most important part of the prosecutorial functions related to the participation in the judicial examination of cases. Prosecutors take part in court proceedings to safeguard constitutional and other legally protected rights and freedoms of persons and citizens and interests of the society and the state.

According to Article 293, Part 7 of the Code of Criminal Procedures, the state prosecutor is governed by the requirements of law and by his/her internal belief based on the investigated circumstances of the case. The state prosecutor may change the charges when and if so required by Article 301 of the Code of Criminal Procedures as well as decline them (in whole or in part) if arrives at the conclusion that they were not proved in court.

Thus, the existing laws in Belarus which regulate the prosecution authorities follow the tendencies established in international standards. At the same time, the law-applying practice allows for violations of international law and national legislation, as it was vividly illustrated during the pre-trial investigation and judicial examination of the criminal cases instituted with regard to the 19 December 2010 events.

59 UN Guidelines on the Role of Prosecutors, paragraph 16. // http://www2.ohchr.org/english/law/prosecutors.htm

Various human rights defending organizations reported on cases where lawyers were denied access to arrested persons kept in the KGB detention center at the stage of pre-trial proceedings.[60] Lawyers repeatedly tried to get to their detained clients but they would be allowed to get in only after the official interrogation had been over or right before the very end of the investigation. Regarding the violations of their rights and the rights of their clients, lawyers lodged numerous complaints with the prosecution authorities which, according to the Constitution and the Law on the Prosecutor's Office, are to supervise the observance of the law in the country and react to exposed violations of citizens' rights through measures of prosecutorial oversight.

For instance, A. Mihalevich's lawyer filed three such complaints. But, in violation of law, lawyers' complaints either were left unanswered or the replies contained standardized wording that no violations had been detected.

In the course of the pre-trial investigation, a number of accused persons (Sannikov, Mihalevich, Otroshchenkov and others) and their lawyers reported on measures of physical and psychological pressure applied to them. In this regard, both the lawyers and their clients lodged multiple complaints with the prosecution authorities and made respective statements before the court. Yet, both the authorities and their officials refused to admit the violations of law and did not adequately respond to the facts of torture and maltreatment during the conduct of investigative actions.

The prosecution authorities similarly treated complaints from V. Nekliaev, a former presidential candidate, and his lawyer who informed about the fact of battery and injuries that were caused to Nekliaev by unidentified people in black outfits on 19 December 2010 in Kollectornaya Street prior to the events in October and Independence Squares. On 10 August 2011, i.e. 8 months after the incident, the prosecution authorities refused to institute a criminal case as they had not found any element of crime in the actions of those black-clothed people.

The prosecution authorities demonstrated their dependence on the executive branch of power during the pre-trial investigation by sanctioning the pre-trial restraint of liberty in the form of detention in custody for all persons arrested under the instruction of the body in charge of the investigation. The only reason for such sanction was the severity of the incriminated charges as publicly declared by top-rank officials of the country well before any court hearings took place.

Another form of such dependence should be noted. During debates in court, state prosecutors fully supported the charges in most of the trials. As the analysis of the sentences shows, judges in some cases themselves excluded from the sentences those qualifying elements which had not been proved in court.[61]

Inconsistency in the prosecution's position was also demonstrated by the fact that some of the accused (Halip, Martselev, Severinets and others) had been initially charged under Article 293 of the Criminal Code (participation in mass disorders), but in the course of the pre-trial investigation their charges were changed to charges under Article 342 of the Criminal Code (arrangement and preparation of actions gravely violating public order).

60 See, for example, Shattering Hopes: Post-Election Crackdown in Belarus. Human Rights Watch, 14 March 2011. // http://www.hrw.org/sites/default/files/reports/belarus0311Web.pdf

See also: Analytical Review No. 3-1: Realization of the Right to Protection and Freedom of Legal Profession in the Light of the Events in the Republic of Belarus during December 2010 – January 2011 (prepared by the International Observation Mission of the Committee on International Control over the Human Rights Situation in Belarus) // http://www.hrwatch-by.org/sites/default/files/IOM_Analytical_Review_N3-1_ENG.pdf

61 For example, the conviction sentence dd. 12 November 2011 (defendant Baranovich); the court excluded from it any references of alleged preparations to arsons and armed resistance to the police because the prosecution had failed to present sufficient and reliable evidence.

There was another form of non-objectiveness and partiality on the part of the prosecution which was demonstrated during the hearings in court: motions from the prosecution to enter irrelevant evidence into the case file. The prosecution entered huge amounts of proofs into the case file, although they should have been evaluated as irrelevant. For example, the prosecution requested entering the following information into the case file: data on the number of times the presidential candidates traveled abroad, property in their possession, number of times they were brought to administrative liability, their violations of traffic rules while driving a vehicle, their medical condition, their bank accounts, as well as data on objects in their offices and places of residence, contents of their computers and even of files and envelopes on their desks. The court entered all those records in the case file, though they may not be regarded as admissible material evidence if their relevance to the case is not grounded.

The prosecution produced video fragments before the court but failed to identify their source. The fragments themselves often were a combination of various clips shot by various people during the 19 December evening. Due to that fact, the video fragments made it impossible to identify the sequence of events they covered. For instance, one fragment was a footage of a speech by a presidential candidate at the rally in October Square, with the very next one showing how some people are breaking windows of the House of Government (located in Independence Square). That suggested a wrong impression of a close connection in space and time between the both events.[62]

As mentioned above, the existing laws in Belarus require from the public prosecution to produce both inculpatory and exculpatory evidence before the court. However, the prosecution failed to properly meet this requirement in some of the criminal processes. For example, a video was played back during the judicial investigation stage of the trial against Statkevich et al. The playback lasted for several hours. At a certain moment one of the fragments showed a man approaching those protestors who were committing violent actions in front of the House of Government. He was heard saying, among other things: *"Sannikov tells you to stop it — back away."* This particular fragment failed to be demonstrated in the trial against Sannikov where it could have served as important evidence. In fact, a video fragment showing Rymashevsky, a former presidential candidate, acting in the same way was played back during the trial against Sannikov. After that, the judge turned to Sannikov and asked, *"Did you try to stop it? And if no, then why?"* into account that this particular video fragment was found of special interest by that judge, it becomes clear that the video record where Sannikov's representative did try to stop the violence would have been undoubtedly admitted as relevant. This exculpatory fragment should have been shown in the trial against Sannikov, but the prosecution made no respective motion.

Differences in the legal status of the public prosecution and that of the defence lead to the situation when the prosecutor, not the judge, acted as an arbitrator regulating access for the defence to experts, searches and compelled testimony. The prosecution must have produced to the defence all evidence of innocence in its possession, not only those entered into the case file, with proper reasons given as to any exceptions (such as matters of state security, witness protection etc.).

Moreover, as required by international standards and national law, public prosecutors must refuse to use evidence against suspects that they know or believe on reasonable grounds was obtained through unlawful methods.

In the court trials related to the 19 December 2010 events, public prosecutors demonstrated full disrespect to these requirements of the law and, when supporting the charges, referred to such inadmissible evidence as records of wiretapped telephone conversations,

62 *For example, the transcript of the court session on 4 May 2011 (defendant Sannikov) and the transcript of the court session on 14 May 2011 (defendant Statkevich).*

video records and suspects' pre-trial testimonies obtained under psychological and physical pressure.

3.2.4. Role of the Aggrieved Person (Victim)

The last decade has seen a clear-cut tendency in international law to admit the legal status and rights of victims who suffered from grave violations of human rights, criminally punishable offences and crimes specified by international law. In particular, international bodies responsible for the protection of human rights pay special attention to the role of victims in the criminal process. Similarly, victims of other crimes may enjoy the same status.

Existing international standards in this sphere are put together in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[63]

States must take appropriate measures to ensure victims' safety, physical and psychological well-being and privacy, as well as those of their families. At the same time, such measures must not serve to compromise the suspect's right to a fair and impartial court hearing and must not be incompatible with such right.

At all phases of the criminal process including the pre-trial investigation, victims and their relatives must be protected from attacks, maltreatment, threats of death, harassment, intimidation, revenge or repression arising out of their complaint, testimony, participation in the criminal process or any evidence they produce.

In exceptional cases and under judicial oversight, investigative or prosecutorial bodies may refuse to disclose information enabling to establish the identity of a victim or his/her relatives during the investigation into a criminal case. At the same time, the information about the identity of anonymous victims must, in all cases, be disclosed beforehand, in advance of the trial, to ensure fair court hearings.

The International Covenant on Civil and Political Rights guarantees the right to confrontation in the context of criminal proceedings. As arises out of the wording of Article 14, paragraph 3 of the Covenant, legal tools that the prosecution has in its possession whereby to ensure that the witness appears before the court lay the foundation for the right of the defence to seek the same. Applicable international standards specify that, in case a witness fails to be present in the courtroom, the court, with very limited exceptions, should not base its sentence on the evidence obtained from such witness's written testimony. If the sentence is exclusively or decisively based on the written testimony of a witness whose confrontation with the defendant is impossible neither prior nor during the trial, then the defence appears in an unfavourable position incompatible with the norms of international law.

The Constitution of the Republic of Belarus does not provide persons charged with a criminal offence with a direct guarantee of the right to confront and cross-examine witnesses against them. The list of rights of the accused which is given in the Code of Criminal Procedures also lacks an indication to the right of confrontation. However, as a rule, all relevant evidence is subject to examination in court, and the defence always uses its right to interrogate all the witnesses who testify before the court.

The Belarusian laws recognize the victim (the aggrieved person) not only as a participant in the criminal process but also as a separate party to it which is interested in its outcome. Article 50 of the Code of Criminal Procedure establishes the right of a victim to testify and be present at court hearings as well as express opinions and make objections. In fact, the Code of Criminal Procedures requires that the victim participates in the criminal process on a mandatory basis. In case a victim is absent at a court hearing, the court must

63 *Approved by UN General Assembly Resolution No. 60/147 of 16 December 2005.*

decide whether to proceed to examine the case or to postpone it (Article 296, Part 2 of the Code of Criminal Procedures).

As long as the Belarusian laws do not insist on the right to confrontation and virtually allow entering written testimonies into the case file among other evidence despite the fact that the defence had no chance to interrogate the person so testified, they come into contradiction with international standards.

In the course of court hearings of the cases initiated in connection with the 19 December events, 29 policemen who were on duty that night acted in the capacity of aggrieved persons and testified about crimes allegedly committed against them. Some of them testified in all 8 criminal trials where aggrieved persons were claimed as part of the case. In all the trials, none of the aggrieved policemen were able to identify any of the accused as the person who caused them the alleged injuries. All the aggrieved persons behaved passively and refrained from claiming any moral or material damage. None of the 29 policemen brought a lawsuit in court. Their status as aggrieved persons, their testimonies (especially when many of them did not appear in court, though summoned) and some aspects regarding the protection of their rights gave rise to much controversy. There were no aggrieved persons in the cases against Parfenkov and Molchanov, Novik and Otroshchenkov at all, but that fact did not prevent the courts from imposing sentences of conviction.

As pointed out in the OSCE/ODIHR Trial Monitoring Report, *"Throughout the trials a substantial number of police victims/witnesses failed to testify because they were on training exercises, were ill, or had a similar excuse. In many of those instances the defence would seek to resend the summons or put the trial on hold until the witnesses were available. In no instance did the judge deem the witnesses important enough to stay the trial, although on several occasions the judges agreed to re-send the summons. Thereafter, the judge would give up and the pre-trial statement would be read out — thus depriving the defence of its right to confront this witness."* [64] All such victims' affidavits that had been read out in court were used in this case as a basis for sentences of conviction.

A serious problem occurred with the practice that allowed victims, who would later testify, to be present in the courtroom throughout the hearing. As mentioned, national law allows this practice with respect to "victims," while witnesses on the other hand are excluded from the courtroom until the moment they are called. Excluding witnesses pursues the legitimate aim of preventing witnesses from being exposed to others' testimony and potentially adjusting their own one. In the Sannikov trial, the non-exclusion of all the victims created a particular problem when the defence, on a number of points, caught out one such victim. The remaining victim-witnesses carefully avoided that error.[65]

Even though it is understood that the victims' continued presence in the courtroom is intended to protect their rights as victims, the victims in these trials were frequently absent from the courtroom. For instance, at the court hearing of the Statkevich case on 16 May 2011, one victim, a special-purpose police officer, was absent due to *"an unlimited business trip."* [66]

Moreover, in some court hearings, the aggrieved persons never appeared in court unless they were to testify — in some hearings, that moment came only several days after the trial commenced. Then they left immediately after testifying. At the same time, nobody cared to remind the aggrieved persons that, by leaving the courtroom, they waive some important rights. The court did not mind it as well. The fact that the aggrieved persons were

64 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011, paragraph 282. // http://www.osce.org/odihr/84873

65 Transcript of the court session on 6 May 2011 (defendants Sannikov et al).

66 OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011, paragraph 288. // http://www.osce.org/odihr/84873

brought in right on the day they were to testify and were allowed to leave shortly thereafter either speaks in favour of serious disrespect of their rights as victims or totally undermines their status as aggrieved persons.

Additionally, special attention should be paid to the possibility, provided by law (Article 68 of the Code of Criminal Procedure), to read out testimony of a witness or victim if he/she falls under the protection measure relieving him/her from mandatory appearance before the court. It should be noted that, as a rule, the safety measure of non-disclosure of his/her personal data is simultaneously applied to the person so protected. Hear we speak about the use of testimony by anonymous victims (witnesses) when hearing a case in court.

By law (Article 65 of the Code of Criminal Procedures), the above-mentioned safety measures may be applied not only by the judiciary but by the criminal prosecution authorities as well, that is, by the prosecutorial party of the trial. Moreover, the criminal prosecution authorities quite often use the right to relieve a witness from the necessity to appear in court as an impetus for such witness to give 'necessary' testimony. At the same time, it makes completely impossible for the defence to interrogate such victim/witness and, where the non-disclosure of personal data is applied, to make an adequate assessment of such testimony, which, in turn, is a violation of the guarantee for the accused to examine witnesses against him or have them examined (in line with the principle of adversarial trial). The described situation occurred in the criminal trial against Dashkevich and Lobov where, despite controversial testimonies by "anonymous victims," both the defence and the accused were deprived of the opportunity to interrogate those victims in person.

In its practice, the European Court of Human Rights has quite often had to address the issue of admissibility with regard to anonymous testimony obtained outside the visual contact between the interrogating and interrogated parties. To that end, the ECHR has set forth conditions wherein such testimony may be admissible in terms of adversarial standards:

a) sufficient data is available that proves the existence of a real threat of intimidation or violence to be used against witnesses;

b) anonymous testimony is neither the only ground of the conviction nor even the predominant one;

c) anonymous witnesses do not belong to the police staff unless in the most exceptional circumstances;

d) defence lawyers are provided with the opportunity to have a direct interrogation of anonymous witnesses (i.e. face to face), though in absence of the accused, so that the defence had a chance to watch the witnesses' reactions to the questions and make conclusions on the integrity of their answers.

As analyzed, the Belarusian laws and law-applying practices in this field fail to comply with international standards.

3.3. Observance of Standards for Pre-trial Proceedings

3.3.1. Right to Liberty and Prohibition of Arbitrary Detention

In accordance with Article 9 of the International Covenant of Civil and Political Rights, everyone has the right to personal liberty. No one may be arbitrary deprived of liberty (including arrest, pre-trial detention and detention in custody). Detention and pre-trial custody are only possible on grounds established by law. They must not be arbitrary and may be carried out only by an authorized person. Pre-trial detention in custody with respect to persons charged with a criminally punishable offence must not become the general rule.

Article 5 of the European Convention on Human Rights formulates almost the same meaning of the right to liberty and prohibition of arbitrary detention. The main difference is in paragraph 1 which not only refers to national law but also lists specific cases where deprivation of liberty is justified from the viewpoint of the Convention.

Both the Covenant and the Convention establish that the matters of detention and holding in custody must be decided and implemented in strict accordance with national law. Therefore, any violation of national law when depriving a person of his/her liberty will always be a simultaneous violation of the Covenant and Convention.

States must guarantee the right to liberty and security of person to everyone within their territory, under their jurisdiction or effective control as well as guarantee that no one is arbitrarily deprived of liberty as a result of arrest or detention.

In accordance with the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority, and "detention" means the condition of a person deprived of personal liberty except as a result of conviction for an offence.

Any arrest, detention or imprisonment must only be carried out strictly in accordance with the grounds and procedures established by law and by competent officials or persons authorized for that purpose.

No one may be subjected to arbitrary apprehension or detention in custody. The term "arbitrary" does not coincide with the term "in violation of law" and must be interpreted in a broader sense including such elements as inadmissibility, unfairness and insufficient predictability. This means that detention of a person in custody as a result of lawful apprehension or taking into custody must not only comply with the requirements of the law but must also be reasonable in terms of the then existing circumstances. Such detention in custody must also be of necessity, for instance, to prevent an escape, a threat to the integrity of evidence or repeated commission of the crime.

According to international standards, any deprivation of liberty must meet the following general principles:

- lawfulness (substantive and procedural grounds);
- legitimacy (purpose of detention in custody);
- necessity and reasonability;
- proportionate manner;
- protection of human rights, in particular of the right to privacy, right to freedom from arbitrary detention and the right to effective remedies

It must be evaluated separately for each particular case whether pre-trial detention in custody is proportionate, necessary and reasonable. However, any proportionate, necessary and reasonable pre-trial detention in custody must take proper account of several factors including the following:

- gravity of the alleged crime;
- complexity of the investigation due to the character of the crime and the number of alleged offenders;
- type and severity of possible punishment;
- risk of escape from, or non-appearance for, justice;
- risk of destruction or forgery of evidence by the accused;
- probability of repeated commission of the crime by the accused.

Pre-trial detention in custody must not be the general rule; it should be used in criminal

trial proceedings only in exceptional cases and for a shortest possible period of time when interests of justice or investigation into the alleged crime so require or in order to protect the public and the victim.[67]

States must establish, by national law, grounds, conditions and procedures governing the issue of warrants for arrest or detention, and grounds on which officials are authorized to issue such warrants, and determine which particular officials are authorized to execute such warrants. States must ensure, also by adopting legislation and respective procedures, that everyone arbitrarily deprived of liberty has effective remedies and reimbursement of damages including the payment of compensation.

The principle "by law" implies "by national law"; however, national law itself must meet principles stipulated by, or arising out of, international human rights.

Article 25 of the Constitution of the Republic of Belarus establishes the right to liberty and security of person, providing that *"the state shall ensure freedom, security and dignity of person. Restriction or deprivation of personal liberty is only possible in cases and through procedures established by law."* The Constitution provides detained persons with the right to check the lawfulness of their detention. The Code of Criminal Procedures specifies that detention may be applied:

a) to a person suspected of having committed a crime which may entail punishment in the form of deprivation of liberty;

b) to the accused to charge him/her with a crime;

c) in case the accused has breached the conditions of the softer pre-trial liberty restraint measure applied to him/her (Article 107 of the Code of Criminal Procedure).

Detention of a person arrested on the suspicion of committing a criminal offence may not exceed 72 hours. When the detention period of 72 hours (or 10 days, where circumstances so require) expires, the detained must be released from custody or a pre-trial liberty restraint measure must be applied to him. In case a pre-trial liberty restraint measure is imposed on the detained, he/she must be officially informed of the charges against him/her no later than 10 days from the moment of the detention (Article 108 of the Code of Criminal Procedures).

The Code of Criminal Procedures provides a number of general grounds for the application of pre-trial liberty restraint measures, for prosecutors and judges to be guided in their respective decisions. The law lacks a requirement to use detention in custody as the pre-trial measure of last resort.

The Belarusian laws allow detention in custody [as a pre-trial liberty restraint measure] when an alleged crime is punishable by deprivation of liberty for over two years. Detention in custody as a pre-trial liberty restraint measure with respect to persons charged with a grave or gravest crime may be motivated just by the gravity of the crime (Article 126 of the Code of Criminal Procedures).

The right to issue a warrant for taking into custody is vested in the Prosecutor General of the Republic of Belarus, prosecutors of lower levels and in the Ministry of the Interior, chairman of the State Security Committee (KGB) and deputy chairman of the State Control Committee who is also heading the Financial Control Department.

The longest term of detention in custody is two months, but it may be extended up to three months by the respective district prosecutor in case it is impossible to finalize the pre-

67 *International Covenant on Civil and Political Rights, Article 9(3); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 36(2); United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), paragraph 6.1; Spakmo v. Nor., Comm. 631/1995, U.N. Doc. CCPR/C/59/D/631/1995 (HRC 1997), paragraph 6.3; and UN HRC General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), paragraph 3.*

trial investigation within two months, or up to eighteen months (by a prosecutor including the Prosecutor General) in case the detained faces charges of a grave or gravest crime or, *inter alia*, if there are grounds in support of the suspicion that he/she will flee from investigation.

By national law, the very gravity of the investigated crime a person is charged with is sufficient to hold him/her in custody — without making a personalized assessment of whether the accused is capable to *"destroy proofs, exert pressure on witnesses or evade public justice."* Moreover, the Belarusian laws still provide the prosecuting authorities with initial discretion of taking into custody. The UN Human Rights Committee has already drawn attention of Belarus to the fact that the permission to prosecutorial officials to take such decisions comes into contradiction with the International Covenant on Civil and Political Rights. Due to their role in the criminal prosecution that follows, they lack impartiality which is required by Article of 9 of the ICCPR. The UN Working Group on Arbitrary Detentions arrived at the same conclusion, noting that the Prosecutor's Office of the Republic of Belarus, even if to view it as an independent institution, is not an appropriate body to decide on taking into custody.[68]

It should be noted that most of the suspects in the court trials related to the 19 December events were held in custody within the entire pre-trial and trial period. The duration of their custody at the pre-trial phase varied from three to six months, which is in line with international standards concerning the right to trial within a reasonable time. At the same time, serious questions arise as to the grounds behind keeping those persons in custody, their treatment during the detention in custody and the availability of access to lawyers.

Later, ten suspects under the cases in question were charged during the pre-trial proceedings with less dangerous crimes specified by Article 342 of the Criminal Code. Those suspects were released until the end of the investigation and retained liberty within the entire court proceedings. All persons charged under Article 293 of the Criminal Code (except D. Uss) remained in custody within the entire criminal proceedings. In most of the cases, their custody was sanctioned by prosecutor. Subsequently, the imposed pre-trial liberty restraint measures could be changed only if the gravity of the charges changed.

In terms of international standards, the problem is not only with the body authorized to take the initial decision on taking into custody but with the grounds for it as well. For instance, the defence in each trial moved the court to mitigate or cancel the pre-trial liberty restraint measure applied to the accused. And each time the prosecution objected such motions. Judging by respective discussions in court and decisions the judges took, it becomes clear that the gravity of charges was the only criteria for the extension of detention in custody, not an individualized assessment of the suspect against admissible grounds for the application of pre-trial imprisonment.

In the period of the pre-trial investigation, the head of state made a media statement suggesting that it is he who is in charge of decisions on taking a person in custody, not the judiciary. Numerous mass media reports were published on 17 April 2011 quoting the President as saying, *"There they popped up: Bogdankevich, Kozulin, Lebedko. I released the latter from prison, by the way; yet, he is barking today." "They are riffraff, really. You'd better say 'thank you' to this President who released you from jail,"* he added.[69]

All the above implies that Belarus violates the provisions of Article 9 of the International Covenant on Civil and Political Rights. The Covenant clearly indicates that a decision to take a person into custody must be taken by *"a judge or other officer authorized by law to exercise judicial power."* If such a decision is virtually taken by either a prosecutor or a

68 Report of the UN Working Group on Arbitrary Detentions: Mission to Belarus, 25 November 2004. E/CN.4/2005/6/Add.3, §39.

69 http://www.charter97.org/be/news/2011/4/16/37792/

judge but upon request by the President, the consequences of such decisions equally constitute a serious infringement on the independence of these legal institutes.

3.3.2. Right to be Informed of the Reasons for Detention and of Any Charges

Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment specifies that *"anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him."* [70] Each detained person must be informed of the reason for his/her detention at the time of his/her detention and must be promptly informed of any suspicions or charges against him/her. Everyone who is detained must be informed about the reasons for his/her detention.

Reasons for the detention which are to be communicated at the time of the detention:

- must include a clear explanation of legal and factual grounds for the deprivation of personal liberty;
- must be sufficiently detailed so that the person deprived of his/her liberty is able to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

If a person does not adequately understand or speak the language used by the authorities responsible for his/her detention, he/she is entitled to promptly receive the abovementioned information in a language which he/she understands.

Everyone who is arrested or detained on a criminal charge must be informed promptly and in detail in a language which he/she understands about the nature and cause of the charges against him/her.

The information so provided must contain details of the incriminated offence or action including a possible measure of punishment and charges brought or statement of crime made as well as a detailed reference of the respective laws.[71]

As explained by the UN Human Rights Committee, the right to be promptly informed about the charges requires that the information is to be provided as described above as soon as competent authorities bring such charges.

According to the Code of Criminal Procedures, every detained person who is subjected to a pre-trial liberty restraint measure must be informed of the charges against him/her no later than ten days following the actual moment of his/her detention; those detained for a period up to 10 days must be informed of the charges against them no later than 128 days following the actual moment of their detention. Holding a person in custody up to 10 days (or, in some cases, up to 20 days) without bringing charges against such person can hardly be accepted as being in conformity with the guarantees laid down in Article 9 of the Covenant, i.e. the promptness of information about the charges brought.

As required by international standards, any charges against a person must be communicated to such person without delay. Understandably, the observance of this requirement in each particular case will depend on the actual circumstances of the case. In some exceptional, extremely complicated cases it will probably take several days to prepare the charges. In any case, the provision of information about the charges in twenty, or even ten, days' time following the detention can hardly be justifiably regarded as *"without delay."*

In practice, even if a pre-trial investigation body is actually able to bring charges earlier

70 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted by UN General Assembly Resolution 43/173 of 9 December 1988), Principle 10. // http://www2.ohchr.org/english/law/bodyprinciples.htm

71 UN HRC General Comment No. 13: Article 14 (Administration of Justice), paragraph 8. // http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd

than in 10 days, it will often refrain from doing so and prefer to wait until the permitted 10 days are over. That was the way all detained in connection with the events of 19 December 2010 were informed of the criminal charges against them. This violates the international principle of prompt information about the charges.

3.3.3. Right to be Informed of One's Rights

"Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights." [72]

Any arrested or detained person has the right to be notified of his/her rights in a language he/she understands, including the right to:

a) legal assistance;

(b) medial examination and aid;

(c) inform a relative or friend about the arrest or detention;

(d) contact a consular office (for foreign residents) or international organizations; and

(e) receive information explaining how to make use of these rights.

Any person who is arrested or detained and does not adequately understand or speak the language used by the authorities responsible for his/her arrest or detention must receive in a language he/she understands the information on, and an explanation of, his/her rights and how to avail him/herself of such rights.

Each arrested or detained person must be promptly informed of his/her rights, in particular of the right to:

- have access to a lawyer (legal counsel) of his/her own choice, i.e. to have prompt and regular access to this professional;
- undergo a medical examination and receive medical care and treatment;
- notify or require the competent authority to notify members of his/her family or other appropriate persons of his/her choice about his/her arrest or detention or of the place where he/she is kept in custody;
- communicate with family members and friends, including the right to be visited and to correspond;
- challenge the lawfulness of his/her deprivation of liberty by resorting to *habeas corpus, amparo* and other similar judicial proceedings.

If an arrested or detained person is a foreigner, he/she must be promptly informed of his/her right to communicate, by appropriate means, with a consular office or the diplomatic mission of the state of which he is a national or which is otherwise entitled to receive such communication in accordance with international law, or with the representative of the competent international organization, if he/she is under the protection of an intergovernmental organization.

Article 110 of the Code of Criminal Procedures of the Republic of Belarus sets forth the requirement for the official who carried out the detention to inform the detainee of the rights he/she is entitled to immediately after he/she is brought to the criminal prosecution body. The blank form which is used to record the notification of the detainee about his/her rights meets international standards, but, as the respective law-applying practice shows, the rights are communicated and explained in a perfunctory manner. The provisions of the Code of Criminal Procedure do not require that an official explains how a detained person can avail him/herself of his/her rights. Poor procedural knowledge or lack of respective

72 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 13. // http://www2.ohchr.org/english/law/bodyprinciples.htm

experience or other reasons may make it impossible for a detainee to use the rights he/she is entitled to.

Cases when a person is interrogated in the capacity of a witness about circumstances which may appear inculpatory for this person are typical examples of violating the guarantee of the right to be notified of one's rights. It sometimes happens in practice that instead of being notified about charges or suspicions against him/her, the detainee's real procedural status is concealed from him/her and, so misled, he/she gives a testimony which may later be used against him/her.

It is quite frequent in the pre-trial practice when a detained person, being in the state of confusion, is offered — *"as a mere formality"* — to sign the Suspect Interrogation Minutes without prior notification of his/her rights and without clear explanations of the suspicions and evidence against him/her. In some cases under study, detainees were deliberately misled by persuasions that there were no charges against them and that they allegedly needed no lawyer because what was happening was allegedly a free conversation to establish *"the truth of this case."* Later, video records of such "conversations" were used in court. That happened with Alexandr Klaskovskiy, i.e. a video record of his "conversation" with people who were likely to be law enforcers was used in the criminal trial against him. This video record suggests that Klaskovskiy was not properly informed of his status and of his rights, in particular of the right to refrain from testifying against himself.

This is a widespread practice when investigators choose not to properly fulfill their duty of informing a detained person about his/her actual procedural status, i.e. of a suspect, and explaining his/her right not to witness against him or herself, as they wish to achieve favourable conditions for the investigation through infringing on the rights of the detained. It should be noted that even the explanation of the above-mentioned rights does not ensure guarantees for the rights of detained and arrested persons in their entirety. Detainees must be unambiguously notified that they have the right to remain silent and that their refusal to reply may not be used against them or even as evidence of their guilt.

The requirement of prompt information about the rights was widely violated during the mass detentions of opposition activists on 19 December 2010: detainees were forced into special-purpose vehicles or buses where they had to spend lengthy hours with full disrespect to the observance of their rights.

3.3.4. Right to Legal Assistance before Trial

According to principles 17 and 18 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, any arrested or detained person has the right to have prompt assistance of a lawyer at the time of pre-trial custody, interrogation and/or pre-trial (preliminary) investigation. Everyone has the right to have a legal counsel of his/her own choice. If a detained person is unable to pay for the lawyer's services, the state must provide these services without payment by him/her.

The UN Basic Principles on the Role of Lawyers lay down the same rule whereby each arrested or detained person has the right to receive legal assistance without delay. The right to legal assistance includes the right to communicate with his/her lawyer (legal counsel) without interception, censorship and in full confidentiality.[73] The access to the lawyer may be delayed only in exceptional circumstances and on the basis of strict criteria to be specified by law or lawful regulations, when a judge or other authority considers it indispensable in order to maintain security and order. In any case, a person who is deprived of liberty must get access to his/her lawyer within 48 hours following the moment of detention or taking into custody.

73 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18(3). // http://www2.ohchr.org/english/law/bodyprinciples.htm

If a detained person does not have a legal counsel of his own choice, he is entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

International precedent law and international standards[74] require that places for meetings between detained persons and their lawyers should be allocated in prisons or other places of detention. According to paragraph 8 of the UN Basic Principles on the Role of Lawyers, lawyers must be provided with opportunities to meet with their clients tete-a-tete and communicate with them in conditions that ensure full confidentiality of the communication.

The communication confidentiality requirement equally applies to any interviews between a detained person and his/her lawyer, any exchange of messages between them, any documents and lawyer's files on this case.

When studying the cases on the participants of the 19 December 2010 events in Minsk, the following violations of the right to pre-trial legal assistance were found:

- failure to provide certain suspects and accused persons with prompt access to their defence lawyers (well in excess of the required limitation of 48 hours from the actual detention or arrest);
- failure to ensure, or prevention of, confidential and unlimited communication between lawyers and their clients;
- covert postal censorship of the correspondence from persons detained in custody to their defence lawyers;
- administration of the entry into the legal profession, including the cessation of the right to exercise the legal profession, by a body of the executive, i.e. the Ministry of Justice;
- interference by a body of the executive, i.e. the Ministry of Justice, in the activity of the legal profession which must instead be independent, namely:
    - application of administrative measures to lawyers following their media interviews in favour of their clients whereby they publicized violations of their clients' rights;
    - infringement on the right of some accused persons to have a lawyer of their own choosing by depriving their lawyers of advocacy licences for the active stance in the case and on trumped-up grounds;
    - conduct of targeted audits of lawyers who were involved in the studied criminal cases, by the Ministry of Justice; and
    - initiation of an extraordinary qualification examination of all the bar members in Belarus by the Ministry of Justice.

Although the Constitution, codes and laws of Belarus provide suspected or accused persons with the guarantee of the right to defence and legal assistance by a lawyer of choice, it appeared to be almost impossible for those detained in custody under the criminal cases related to the events of 19 December 2010 to exercise this right. As an example, almost all those in custody were able to meet with their defenders only at the time of indictment or subsequent interrogations in the status of the accused. Also, there was no chance to meet with the lawyer without the investigator's presence (an exception was granted to A. Polazhenko who had managed to have a 10-minute confidential talk with her lawyer before she was officially informed of the charges against her). If the accused refused to testify

74 UN Standard Minimum Rules for the Treatment of Prisoners (adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977), paragraph 93 // http://www2.ohchr.org/english/law/treatmentprisoners.htm; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18. // http://www2.ohchr.org/english/law/bodyprinciples.htm

(for which he/she has the right), then no interrogations were performed, which meant that he/she did not see his/her lawyer (e.g. A. Lebedko). Complaints of no access to lawyers after detention were made in court by Nekliaev, Feduta, Sannikov and other defendants. Seeking to elicit a meeting with their clients, the lawyers spent several hours a day in the waiting area of the KGB pre-trial detention center; each time to no effect. The formal reason to deny meetings with clients was alleged lack of free meeting rooms. At the same time, lawyers defending persons kept in custody under criminal cases unrelated to 19 December had every chance to regularly meet with their clients and faced no room deficit. The above-mentioned facts vividly illustrate that the right to defence was repeatedly violated.

3.3.5. Right to Have Adequate Time and Facilities to Prepare for the Defence

According to Article 14, paragraph 3 of the International Covenant on Civil and Political Rights, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

In General Comment No. 32,[75] the UN Human Rights Committee, based on its practice, specified that *"what counts as "adequate time" depends on the circumstances of each case. If counsels reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial."* Factors which can influence the determination of "adequate time" include the complexity of the case, access of the accused to evidence and his/her lawyer, as well as the time frame established by national law with regard to such a process.

The right of the accused to have adequate facilities to prepare for the defence implies opportunities to communicate, consult and meet with his/her lawyer without interception or censorship and in full confidentiality meaning that conversations between persons detained in custody and their lawyers may be within sight, but not within the hearing, of law enforcement officials.[76] Communications between a detained person and his/her legal counsel may not be used as evidence against the detained person unless they are connected with a continuing or contemplated crime.[77]

As for the cases against participants of the 19 December 2010 events, an example of violations of this right is the rejection by the court of reasonable motions from the defence to provide sufficient time to read the criminal case records and prepare for debates in court. The courts handled the criminal trials related to the 19 December events in a very intensive way and pronounced breaks in the hearings only for the period from the end of the court's working day until the morning on the next working day. At the same time, issues that had not been examined at the pre-trial investigation phase were also addressed by the court. Respective information objectively needed additional time to be analyzed — all the more so, if to take into account the gravity of the charges incriminated and the liability expected. In any case, a lunch break to prepare for the court debates, as was practiced in most of the trials, cannot be regarded as adequate time.

As detailed by the UN Human Rights Committee, "*'adequate facilities' must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other*

75 UN HRC General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial, paragraph 32. // http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement

76 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18(4). // http://www2.ohchr.org/english/law/bodyprinciples.htm

77 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18(5). // http://www2.ohchr.org/english/law/bodyprinciples.htm

evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim." [78]

There were numerous examples of violations of the above-mentioned right throughout the course of the criminal cases initiated on the basis of the 19 December 2010 events, namely:

- failure to provide the accused and his/her lawyer with an opportunity to get familiarized with all records of investigative activities carried out with regard to the accused;
- ungrounded separation of criminal cases under Article 293 of the Criminal Code against particular persons or a group of persons into individual proceedings despite the requirements of Article 165 of the Code of Criminal Procedures; it had a significant impact on the comprehensiveness, completeness and objectiveness of the examination of the cases in court and resulted in the lack of access by the accused and their lawyers to the evidence regarding "other persons" which were of substantial value and, hence, in the lack of access to all the evidence proving or disproving the fact of mass disorders;
- the lack of required investigation into facts of torture claimed by some defendants resulted in failure to provide the defence with required information about the way the evidence had been obtained (for instance, some confessions of guilt);
- failure to observe the principle of equality of arms regarding the prosecution and the defence; for instance, the defence was not enabled to interrogate witnesses for the defence in court on the same conditions as the prosecution; the court read out written testimonies by the aggrieved persons and witnesses and declined motions by the accused and their lawyers to interrogate those persons in court.

3.3.6. Right Not to be Held Incommunicado (without Communication with the Outer World)

According to generally accepted international standards, everyone who is accused of committing a crime must have adequate time and facilities to prepare his/her defence including opportunities to communicate with a lawyer of his/her own choice.

Secret deprivation of liberty, secret detention, prolonged incommunicado detention or prolonged solitary confinement are strictly prohibited by the norms of international law. As explained in paragraphs 6 and 11 of General Comment No. 20 of the UN Human Rights Committee, prolonged solitary confinement or detention incommunicado may represent a type of torture or cruel treatment.

Persons detained in custody are allowed to communicate with the outer world, in particular with their families and lawyers. This right may be denied for no more than "a matter of days" and only in exceptional circumstances, to be established by law, when a judicial or other authority found such a restriction indispensable in order to maintain security and order or where exceptional needs of the investigation so require.[79]

In any case, persons who are detained in custody must have access to their lawyer no later than forty-eight hours from the moment of arrest or detention.[80]

Any detained or imprisoned person is entitled to notify or to require the competent authority to notify members of his/her family or other appropriate persons of his/her choice of his arrest or detention or of the transfer and of the place where he/she is kept in custody.

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78 UN HRC General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial, paragraph 33. // http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement

79 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 15, 16 and 18. // http://www2.ohchr.org/english/law/bodyprinciples.htm

80 UN Basic Principles on the Role of Lawyers, paragraph 7. // http://www2.ohchr.org/english/law/lawyers.htm

Such notification must be made or permitted to be made immediately or at least without delay. In individual cases this notification may be delayed if exceptional needs of the investigation so require. In any case, the delay must not exceed several days.

Persons awaiting trial who are subjected to detention in custody as a pre-trial liberty restraint measure must be provided with all necessary facilities and conditions for communication with their families and friends including meetings with them. This right may only be restricted in cases, to be specified by law, when the interest of justice or security and order in places of detention so require.

Foreigners who are held in custody have the right to communicate with a consular office or the diplomatic mission of the country of which they are nationals.[81]

Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person must be entitled to notify or to require the competent authority to notify members of his family, or other appropriate persons of his/her choice, of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody. If a detained or imprisoned person is a juvenile or is incapable of understanding his/her entitlement, the competent authority must on its own initiative undertake such notification.

The right to maintain contacts with persons outside the place of detention is one of the important additional safeguards. According to the Code of Criminal Procedures of the Republic of Belarus, a notification of detention is to be made by either the official who conducted the detention or this right is granted to the detainee. Such notification must be made within 12 hours from the time of actual detention. If detention is applied as a pre-trial liberty restriction measure, then the notification is to be made by the body in charge of the criminal prosecution or the court which ruled to apply this measure. The list of persons who are entitled to be notified of detention — the detainee's adult family members and close relatives — may appear very short in practice, and a lonely person or one who has no such family members or relatives risks being left without communication with the outer world, i.e. being deprived of the right to notify of his/her detention, which is inadmissible. The Code of Criminal Procedures does not require notifying of the actual place of detention or of the transfer to another one. In practice, it often leads to interruptions in the communication with the outer world, which, in turn, may have a negative impact on the interests of persons deprived of their liberty.

The events of 19 December 2010 showed that most of the detained experienced violations of the right to notify other persons. For instance, V. Nekliaev's family had not for a long time had any information about the presidential candidate's whereabouts after unidentifiable people in plain clothes took him away from the Emergency Aid Hospital. During the first month of detention, relatives of those kept in custody in the KGB pre-trial detention center did not have any information about their health. A number of detained persons were severely beaten by the police upon detention (Sannikov, Nekliaev and Statkevich), and their state of health was unknown as well.

While in the KGB pre-trial detention center, Statkevich started a hunger strike. Any attempts by his relatives to enquire about his health gave no effect.

In a number of cases, detainees were transferred to other detention centers without notice to their relatives, deliberately giving appearance that they were kept on in the KGB detention center. This, for instance, refers to Mihalevich who was being repeatedly transferred from the KGB detention center to Pre-trial Detention Center No. 1 and back within a week. All that time Mihalevich's family could not locate him.

81 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16. // http://www2.ohchr.org/english/law/bodyprinciples.htm

All those released under pre-trial restraint of their freedom of movement as well as lawyers and relatives of other detainees spoke about isolation aggravated by lack of normal correspondence with close ones. On those rare occasions when relatives managed to receive letters from the detention center, they had been delayed for several weeks. Most of the detainees were deprived of access to the press, radio and television and were almost completely isolated from the outside world. Presidential candidate A. Sannikov had been deprived of the right to correspondence with anybody for a month. He was permitted to see his lawyer for the first time on 22 March 2011, i.e. in more than three months after he was arrested. He had been isolated from any outside information for the entire period of his detention.[82]

One of the detainees who spent 27 days in the KGB pre-trial detention center noted that it was the loss of communication with the outer world that was the hardest thing to endure: *"We were held in complete isolation. At one point, I started feeling that there were no people outside, that we were completely alone on some sort of an island. Throughout the entire time, I received one letter from my mother. Later I learned that there were literally bags of mail for me, from friends, relatives and supporters, which I never received. I also wrote regularly, but my mother had only received two letters. No doubt, that was the intention of the authorities, as a way of putting additional pressure on us."* [83]

The above-mentioned examples speak about the gravest violations of international standards in the field of the right not to be held incommunicado (i.e. without access to communication with the outer world).

3.3.7. Right to be Brought before an Officer Authorized to Exercise Judicial Power

The International Covenant on Civil and Political Rights (Article 9, paragraph 3) includes the requirement that anyone arrested or detained on a criminal charge must, to protect his/her rights, be promptly brought before a judge or other officer authorized by law to exercise judicial power.

Any person detained on criminal charges must be able to appear before a judge or other officer authorized by law to exercise judicial power. Any arrest or detention must be brought before a judge or other officer authorized by law to exercise judicial power or be subjected to the effective control of a judicial or other authority. In every case, a judge or other officer authorized by law to exercise judicial power must:

- figure out whether the arrest or detention is lawful;
- determine whether pre-trial detention in custody is required;
- determine whether the person arrested or detained must be released until trial and if yes, then under which conditions;
- guarantee the well-being of the detained;
- prevent any violations of the fundamental rights of the detainee;
- provide him/her with the opportunity to challenge the lawfulness of his/her detention and decide on his/her release in case the detention is against the law or arbitrary.

If after his/her detention a person is brought before an official who is not a judge, such official must be authorized by law to exercise judicial power and be independent and impartial.

As is known, the provisions of the Belarusian Code of Criminal Procedures do not require bringing a detained person under immediate judicial oversight. Any matters related

82 OSCE Rapporteur's Report on Belarus (by prof. Emmanuel Decaux). Vienna, 28 May 2011. // http://www.osce.org/node/78705

83 Shattering Hopes: Post-Election Crackdown in Belarus. Human Rights Watch, 14 March 2011, p. 19. // http://www.hrw.org/sites/default/files/reports/belarus0311Web.pdf

to detentions or the application and extension of detention in custody are decided upon by non-judicial officials and prosecutors. This undoubtedly is a violation of Article 9, paragraph 3 of the International Covenant on Civil and Political Rights. And only when the case file is submitted to court, this matter is brought before a judge for the first time (in violation of the obligation of officials who carried out the detention to bring the matter of lawfulness of the detention for judicial revision regardless of the detainee's will). Only from this moment it can be regarded that the infringement on the right to liberty and security of person complies with the requirements of international law.

Recently, the list of officials who are authorized to decide on detentions and holding in custody has been further extended in Belarus. This step only worsened the position of detainees in terms of the provision of their right to liberty and security of person.

3.3.8. Right to Challenge the Lawfulness of Detention

International legal standards of pre-trial proceedings guarantee that everyone who is deprived of his/her liberty as a result of detention or holding in custody must be entitled, at any stage of the criminal process including investigation and hearing of the case in court, to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his/her detention in order to obtain his/her release without delay, if it is unlawful. The right to challenge the lawfulness of detention before a tribunal, court or judge does not allow for any reservations.[84] This right plays a key role to protect the right to liberty and to prevent arbitrary detention. It is also fundamentally important to prevent torture, cruel treatment, enforced disappearance, detention incommunicado and other grave violations of human rights. In case proceedings are initiated, they must be brought by the authorities, without unjustifiable delay, before the respective court. Courts or judges, when examining the lawfulness of the detention, must take decisions as expeditiously as possible and without unjustifiable delays and rule to release the detained person, if the detention appears to be unlawful or arbitrary.

States must establish mechanisms and procedures (such as, for example, *habeas corpus* and other similar procedures) whereby the lawfulness of detention can be challenged. Such procedures must be simple, expeditious and free if the detained has no sufficient means to pay for them.

The matter of detention lawfulness must be considered by an independent and impartial court or judge acting under law.[85]

For a remedy to be effective, the right to challenge the lawfulness of detention before a court may not be limited or restricted. If the hearing of the matter of detention legality according to *habeas corpus* is, for example, limited to cases where there are no legal grounds for the detention or there is a clear violation of procedural requirements, or where such hearing is made dependent on whether other remedies are exhausted, this diminishes its effectiveness as a mechanism for challenging the lawfulness of detention.[86]

The Code of Criminal Procedures of the Republic of Belarus lays down the right to judicial challenge of detention, taking into custody or extension thereof (Article 143, paragraph 1 of the Code of Criminal Procedures). The defence lawyer of a person detained in custody or such person him/herself is entitled to challenge the writ of custody. The judicial

84 UN HRC General Comment No. 29: Article 4: Derogations during a State of Emergency), paragraphs 14 and 16; International Convention for the Protection of All Persons from Enforced Disappearance, Article 17.2 (f), UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32.

85 Habeas Corpus in Emergency Situations (Articles 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-American Court of Human Rights (Ser. A) No. 8 (1987). // http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/iachrhabeascorpus.html.

86 Concluding Observations of the Committee against Torture: Japan, CCPR/C/79/Add.102, 19 November 1998, paragraph 24.

review of the complaint challenging the lawfulness of detention in advance of bringing the charges is conducted by a judge unilaterally within 24 hours — or 72 hours in case of taking into custody or home arrest — from the moment such complaint is lodged. A complaint claiming unlawful detention in custody is to be considered in a close court hearing. The defender, the victim and legal representatives of the accused have the right to take part in such court hearing except the accused him/herself.

Thus, it may be concluded that the Belarusian laws in the field of pre-trial detention in custody do not comply with international standards.

As shown by the analysis of the law-applying practice in Belarus, the procedure for challenging arrest or detention is inefficient and violates the right to liberty and prohibition of arbitrary arrest or detention.

As explained in Resolution No. 12, On the Practice of Judicial Examination of Complaints Challenging Liberty Restraint Measures in the Form of Taking into Custody or Arrest or Their Extension, adopted by the Plenary Meeting of the Supreme Court on 23 December 2010, [87] the application of a liberty restraint measure in the form of detention in custody to a suspect or accused person on the grounds of the gravity of the crime committed does not relieve the court of the obligation to review, when examining the complaint or protest, both the lawfulness and reasonability of the detention in custody or its extension. At the same time, "reasonability" is understood as the existence of data in the records made available to the court, including data on the person of the suspect of accused person, which support the necessity to apply or extend such liberty restraint measures.

In practice, the court, before taking a decision, neither checks nor takes into account whether the detention is reasonable. As for the criminal cases related to the events of 19 December 2010, there were occasions when the court was not provided with any evidence which would enable to evaluate the personality of the accused or other factors which could justify or disprove the application of detention in custody. Any motions by the defence requesting to oblige the investigation body to provide such data were declined. However, regardless of the lack of such information, the court arrived to a perfunctory conclusion that there were no violations of the law as to the application of restrictive measures in the form of detention in custody.

Moreover, as it was noted, the Belarusian laws (Article 144 of the Code of Criminal Procedures) does not prescribe mandatory participation of suspects and accused persons in the judicial review of the lawfulness and reasonability of their detention, taking into custody or extension thereof, thus, depriving them of an opportunity to directly protect their rights and be tried in their presence.

Article 144, paragraph 3 of the Code of Criminal Procedures provides that, where necessary, the judge may summon a detainee kept in custody or under home arrest to participate in the consideration of his/her complaint. As practice shows, such persons are never summoned to appear in court even on those occasions when they have formally filed a motion requesting to be delivered to court to give explanations.

In some cases related to the 19 December events, the necessity for the accused to be summoned to court and personally participate in the hearings of their complaints challenging the detention in custody was reasoned by the lack of possibility to meet with their lawyers who were not allowed into the KGB pre-trial detention center, and, thus, when the complaints were examined, the lawyers were simply unable to communicate the arguments of their clients to the court. Therefore, the persons kept in custody were deprived of the opportunity to inform the court about any violations committed upon decision to apply detention in custody as a pre-trial restrictive measure. This notwithstanding, the court

87 Published in the National Register of Legal Acts of the Republic of Belarus, 25.01.2011, No. 10, 6/999.

denied the right of the accused to participate in such court hearings. The availability of the provision in the Belarusian laws that allows the court to hear such complaints without the complainant's presence makes their consideration totally inefficient and represents a violation of internationally accepted guarantees (i.e. the right to be tried in his/her presence and the right to defence).

Before 2010,[88] the court had only been entitled to review the procedural correctness of a liberty restraint measure applied, lacking the right and possibility to make a thorough review of the circumstances behind the necessity of its application. In view of the amendments to Article 144 of the Code of Criminal Procedures, now the court must review both the lawfulness and reasonability of the decision taken. It should be noted that the adoption of the new norm has lead to no significant changes in the practice so far. Many judges keep on practicing the perfunctory approach to detention lawfulness revision and in reality tend to support the initial liberty restraint measure applied by the investigator. The matter of detention necessity is almost never reviewed by the court. Much will still have to be done to uphold the interests of detained persons through the application of this norm until a new practice, which would meet international standards, is worked out.

3.3.9. Right to be Tried within Reasonable Time

Everyone who is arrested or detained on a criminal charge has the right to be tried within a reasonable period of time or to be released.

A person arrested or detained on a criminal charge must be entitled to trial within a reasonable time and without unjustifiable delay or to release pending trial.[89] Prolonged detention in custody without trial and/or until trial is prohibited by international law when such delay is not justified and is deemed as arbitrary. In cases related to charges of grave crimes, such as murder, if the court refused to release the accused on bail, the court hearing to examine the case must be held as promptly as possible.[90]

What can be viewed as "reasonable time" has to be assessed depending on the circumstances of each case.[91]

The factors to be taken into account when considering whether the period of time is reasonable are:

- the complexity of the incriminated offence and the number of alleged perpetrators;
- the complexity of the investigation and collection of factual evidence;
- the complexity of legal matters examined under the case where it is relevant for the evaluation of the duration of pre-trial detention;
- the conduct of the accused; and
- the conduct of the officials responsible for the investigation and information of the charges as well the conduct of the court or judge and their attitude towards the case in question.

The right to trial without undue delay encompasses all stages of criminal justice including the stages of sentence and appeal. The period which is taken into account when considering whether this right is observed commences from the very first procedural action (depending on circumstances, for instance, when the suspect was detained, when he/she

88 Respective amendments to Article 144 of the Code of Criminal Procedures were made on 4 January 2010.

89 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 38. // http://www2.ohchr.org/english/law/bodyprinciples.htm

90 UN HRC General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial, paragraph 35. // http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement

91 UN HRC General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial, paragraph 35. // http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement

was informed of the charges against him/her or of the court proceedings with regard to him/her) and expires when all possible appellate and supervisory mechanisms are exhausted and a final decision on his/her case is taken.

The accused may not be held responsible for any delays connected with the exercise of his/her right to remain silent or his/her reluctance to actively cooperate with judicial authorities. Delays in the process may only be incriminated if the accused takes deliberate and purposeful actions to hamper the proceedings on the case.

The Belarusian laws lack an actual legal mechanism to exercise this right. Any practical exercise of the right to judicial remedy is always connected with serious violations of reasonable time for court proceedings. The fact that the Belarusian laws provide neither a definition for the term "reasonable time" nor a mechanism of liability for breaching deadlines of court proceedings serves as a impetus to extend the time frames.

According to the general rule, pre-trial investigation must be finalized within two months following the institution of a criminal case. It may, however, be extended up to three or six months. Further extension of the pre-trial investigation period may only be authorized in exceptional circumstances by the Prosecutor General or one of his/her deputies (Article 190 of the Code of Criminal Procedures).

Pre-trial investigation is deemed finalized on the day when a writ is issued to submit the case to a prosecutor for further filing with the court. The period of pre-trial investigation does not include the time interval within which the pre-trial investigation was suspended.

According to Article 282 of the Code of Criminal Procedure, judicial proceedings on a criminal case must commence in a court hearing no later than fourteen days from the date on which the judge decided to initiate judicial proceedings. As for especially complex cases, this period may not exceed thirty days. At the same time, the total duration of court proceedings on a criminal case is not limited by law in Belarus.

During the analysis of the court proceedings on criminal cases related to the events of 19 December 2010, it was noted that the Belarusian criminal prosecution authorities and judiciary demonstrated unusual promptness as to the observance of deadlines for pre-trial investigation and initiation of court proceedings on the said cases.

3.3.10. Right to Humane Treatment and Freedom from Torture under Detention in Custody

According to Article 7 of the International Covenant on Civil and Political Rights, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

This article distinguishes three types of prohibited conduct against other person, i.e. any person must not be subjected to:

- torture;
- treatment or punishment that is cruel or inhuman;
- degrading treatment or punishment.

States must guarantee humane treatment of all persons deprived liberty and ensure their right not to be subjected to torture or to cruel, inhuman or degrading treatment. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or cruel treatment or of deprivation of persons detained in custody of their right to humane treatment with respect for the inherent dignity of the human person.[92]

States must provide all detained persons with services satisfying their basic needs including food, hygienic and sanitary facilities, beddings, clothes, medical care, access to

92 UN HRC General Comment No. 29: Article 4: Derogations during a State of Emergency), paragraphs 11 and 13. // http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument

natural light, rest, physical exercise, conditions for religious practice and communication with other people including the communication with the outer world.

Any detained person or his/her lawyer or relatives or other interested persons must have the right to make a request or complaint regarding his/her treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

This right includes:

- notification of all persons held in custody of this right upon bringing them into the place of detention;
- confidentiality of the complaint if so requested by the complainant;
- timely consideration of the complaint and reply to it without undue delay;
- the right to bring the complaint before a judicial authority in case it is rejected or the reply is inordinately delayed;
- prohibition of prejudice for making a request or complaint with respect to detained persons or persons having legal interest.

States must take special measures to protect pregnant women and nursing mothers, children and minors, elderly, sick or disabled people when holding them in custody. Women must always be segregated from men and be under the oversight of female personnel; when in custody, they must receive care, protection and all the necessary individual assistance, be it psychological, medical or physical assistance, which they may require due to their gender specifics.

Restrictive facilities including handcuffs, chains and straitjackets must not be used as punishment. In any case, they must not be applied longer than the exceptional need so requires.

The term "torture" is often narrowly understood as the act of causing only physical suffering, which would be incorrect. For example, General Comment No. 20 by the UN Human Rights Committee specifies that *"the aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual."* [93]

As defined in Article 1 of the UN Convention against Torture, *"the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."*

Inadmissibility of torture and other cruel treatment is guaranteed by the Constitution of the Republic of Belarus (Article 25). At the same time, there is no normative legal act in Belarus which contains a definition of "torture" as it is defined in Article 1 of the Convention. The Belarusian laws neither define acts of inhuman or degrading treatment or punishment, which are laid down in the name of the Convention, nor they define acts of torture or distinguish between levels of cruelty. There have been no examples demonstrating that Belarusian courts ever use a definition of torture.

The Belarusian laws do not contain any provision which would specify that neither exceptional circumstances nor any orders from any superior officials or authorities may be used to justify torture.

93 UN HRC General Comment No. 20: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment), paragraph 2. // http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument

At the same time, national law in Belarus provides for legal remedies to protect from prohibited treatment on the part of state officials:

- Article 426 of the Criminal Code specifies criminal liability for the abuse of power or official authority;
- Articles 166, 167 and 172 through 174 of the Code of Criminal Procedures prescribe that a respective official must conduct a review and take an appropriate procedural action in case there are reasons and grounds to institute a criminal case;
- Article 28 of the Law on the Bodies of the Interior of the Republic of Belarus contains a restrictive list of circumstances for possible lawful use of special facilities.

Based on the information about the cases related to the events of 19 December 2010, the following examples can be drawn demonstrating how the accused were treated when in custody; these forms of treatment may be viewed as the violation of the right to humane treatment and freedom from torture under detention in custody:

- lack of individual sleeping places in the cells and the necessity to sleep on the floor, on plank beds, in shifts;
- use psychological and physical influence, use of violence;
- lack of possibility to have a rest;
- compulsory conversations with law enforcement officials without a lawyer for a long period of time (approx. 5 hours);
- lack of access to toilet (were not allowed to toilet);
- while in the cell, the detained were compelled to lie on plank beds with their faces toward the "day" lighting in daytime and towards the bulb lamp on the ceiling in nighttime; if somebody turned away when asleep, the entire cell was waken up to take the "right" pose;
- frisking: detainees were compelled to leave the cell with all personal belongings including the mattress and bedding, then "herded" down a steep staircase into a cold concrete basement;
- detainees were compelled to strip naked, stand with their legs extended in opposite directions as wide as possible ("split") and squat; this was done by at least three specially trained people wearing balaclavas who chanted "beastly yells", basted their batons against the walls and staircases and sometimes allowed themselves to make knocks on detainees' backs and legs;
- detainees were walked along the detention center in handcuffs, often applied behind the back and with arms lifted up ("swallow");
- detainees were compelled to watch internal television which broadcast films with scenes of explicit violence or of anti-Semitic nature ("Russia Stabbed in the Back") an so on.

Some of the above examples describe direct psychological and physical influence which may absolutely clearly lead to physical and mental suffering. Others refer to custody conditions.

It should be noted that the conditions of detention in custody, in particular in pre-trial detention centers, in Belarus do not meet respective international standards. These flaws of the penitentiary system were vividly exposed in the context of the criminal cases on the events of 19 December 2010.

Andrei Sannikov stated at trial that after his arrest on 19 December he was severely beaten and subsequently denied medical assistance and access to toilet. He was made to lie motionless on wooden plank beds under bright light. On 22 January 2011 the KGB head V. Zaitsev visited him and threatened with harm to the health and lives of his wife (I. Halip, a journalist) and his three-year-old child.

Another former presidential candidate A. Mihalevich insisted that he and other persons were subjected to torture in January 2011 while in the KGB detention center. He was pressed to write a plea for pardon to president Lukashenko and make a deal with the KGB. Having done as compelled, he later refused to cooperate with the KGB. The authorities announced that the General Prosecutor's Office had undertaken an official investigation into Mihalevich's allegation and found no evidence to bring any charges against anyone.

Defendants A. Klaskovsky and D. Drozd made similar statements about the use of psychological and physical pressure in the detention center.

Another detained person, N. Radina, a journalist, told after her release that KGB officials had exerted psychological pressure on her and attempted to hire her as an informant. On 10 March 2011, the European Parliament adopted a resolution condemning the application of torture to Mihalevich and Radina.

Other detainees (including A. Otroshchenkov, D. Bondarenko and N. Statkevich) also alleged that they had been subjected to torture or degrading treatment while in detention. *"In some cases, torture was reportedly inflicted by masked personnel — allegedly State security agents — which made it difficult to identify them and impossible to bring charges against them."* [94]

The situations described above refer to the period of detention in custody. However, the way the detentions were carried out in Independence Square and related issues may be cumulatively raised with regard to the violations of the right to humane treatment and freedom from torture under detention in custody.

For instance, on 19 December 2010, the police applied special facilities — rubber batons — to all the detained and other people who were present in Independence Square. The respective statements were made by the accused in their testimonies which were later read out in court hearings as well as in their testimonies before the court. In some cases it was evidenced by medical examination reports issued upon taking into custody at the detention center or by medical expert assessment reports (where such assessment was made with regard to the accused). Apart of that, video records of the crackdown on the 19 December 2010 rally show numerous facts of using rubber batons against unarmed people who demonstrate no signs of resistance. This testifies to the fact that the violence on the part of law enforcers was large-scale and massive. This situation may raise the question of abuse of force, i.e. exceeding the level which would have been sufficient to disperse the demonstration and detain demonstrators who were unarmed and did not resist.

Regarding the cases on the events of 19 December 2010, it can be stated that the police treated the detained in an inadmissible manner to either punish them for their political opinions and participation in the protest action in October and Independence Squares in Minsk or in order to make them testify in a desirable way. The detention of well-known opposition activists and presidential candidates, whose political outlooks are generally known in Belarus, can serve as a more vivid example.

3.4. Observance of Standards for Judicial Proceedings

3.4.1. The Right to a Fair Trial

The defendant has a right to a fair trial, the fairness of the trial is the requirement the international community imposed to criminal justice. Article 10 of the Universal Declaration of Human Rights says: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." The International Covenant on Civil and Political

94 Report of the United Nations High Commissioner on Human Rights on the Situation of Human Rights in Belarus, 10 April 2012.// http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-8_en.pdf

Rights declares in Article 14(1): "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." European Convention for the Protection of Human Rights and Fundamental Freedoms has the similar provisions in Art. 6 (1).

The concept "court" corresponding to all expedient guarantees includes the guarantee of a fair trial which implies the absence of any direct or indirect influence, pressure, intimidation or interruption irrespective of their sources and grounds.[95]

A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects.

The right to a fair trial can be violated in most different ways. The general principle is that the defendants shall be given the real opportunity to answer charges, to study, to express doubt, to confront testimony, to carry out a examination and cross-examination of the witnesses and to do it in the appropriate atmosphere (for example, they shall have the valid and effective opportunity to take part in the trial and to exercise their right to a fair trial).

The right to a fair trial includes the observance of a number of procedural requirements and the guarantees inherent in appropriate process.They are:

- the requirement of the process tribunal or court without undue delay;
- the right of the defendant to be present at the hearing and to be heard in person;
- the right to defence, including the defendant adequate opportunity to respond to charges against him;
- the principle of equal procedural rights or "equality of arms" in the process;
- the principle of adversarial proceedings;
- the right to legal assistance.

The concept of a fair trial with the observance of appropriate guarantees is directly connected with the principle of equality before court and a tribunal. It means the right to equal access and equality of adversary opportunities and assumes that the parties shall be treated in such trials free from any form of discrimination.

The equality of arms and the fairness of a trial can't be interpreted as a guarantee of lack of mistakes on the side of a competent court. Nevertheless, if the assessment of proofs or the application of the law was obviously arbitrary or wrong, or can be considered as "refusal in justice", or the court in any way violated the obligations concerning independence and impartiality, the violation of the right to a fair trial and expeditious process takes place.

The Constitution of Republic of Belarus and the Judicial Code of the Republic of Belarus enshrine that judges shall be independent and subordinate to law alone and any interference in judges' activities in the administration of justice shall be impermissible and liable to legal action.

Any interference with the work of judge in order to prevent thorough, full and objective examination of a case or in order to achieve the pronouncement of an unlawful judgment or decision shall be criminally punishable.

In the CPC the term "justice" is used only as the requirement to a sentence (Art. 350 Part 4 of the Criminal Procedure Code), and is applicable only to the punishment imposed by the court which has to correspond with the gravity of the offence and the personality of the defendant (CPC, Article 393).

It appears that the requirement of compliance as the main content of expeditiousness,

95 UN HRC, General Comment 32. Article 14: Equality before courts and tribunals and the right to a fair and public hearing, para.25. http://www2.ohchr.org/english/bodies/hrc/comments.htm

in relation to justice is expressed in its implementation "on the basis of full equality". The participation in the proceedings on the basis of full equality in the terms of procedural law is referred to as the principle of adversary. And while fairness and adversary are not identical concepts, the international community regards as one of the most important requirements of a fair trial — its implementation on the basis of the adversary and equality of arms.

Such principle is enshrined in Art. 115 of the Constitution of the Republic of Belarus: "Justice is administered on the basis of adversary and equality of arms", and in Art. 24 of the CPC it is detalized. Thus, in the Belarusian legislation it is a matter only of adversary in justice, i.e. in court proceedings that contradicts the international standards.

According to article 24 of the CPC, in a court session of a court of the first instance, and also in hearing the cases by superior courts, the legal procedure is carried out on the basis of the adversary of the parties. When considering the case in court the functions of prosecution, defence and trying the case are separated from each other and can't be assigned to the same body or the same official. All the parties in the proceeding have the equal rights to present the evidence, to participate in their research, to make motions, to express their opinions on any issue important for the correct resolution of case.

However, it should be noted that the prosecutor in the trial has some priority rights over the defence counsel, which is contrary to the principle of fairness and the equality of arms. Under Art. 25 of the CPC, the prosecutor is obliged at all stages of the process to take legal measures to eliminate all violations of the law, no matter where these violations do come from, including the court, whereas the defence counsel does not enjoy such rights. Therefore, the prosecutor is considered as the supervisor of the legality of the court, and the defence counsel (and even the court!) is the subject of supervision, which does not meet international standards.

The court does not act on the prosecution's or the defence's side, and does not express any of their interests. The court, preserving objectivity and impartiality, creates the conditions necessary for the implementation of their procedural obligations by the parties and the exercise of their rights (Art. 24, part 5 of the CPC).

Unfortunately, it must be noted that the activity of the court in criminal proceedings has long become really prosecution-biased, as the rights specified in the Code of Criminal Procedure, are often used by the court mostly to fill in the gaps for the prosecution, not the defence, to confirm the conclusions made by the prosecution at a trial. This was highlighted in court proceedings related to the events of December 19, where all 12 trials were adjudicated with convictional sentences, although many of the defendants didn't confess their guilt and there was lack of totality of reliable and admissible evidence.

3.4.2. The right to a Public Hearing

With the rare exception, trial in criminal proceedings shall be open to the public, and the court judgments shall be made available to the public.

All trials in criminal matters must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.[96]

Any person charged with an offense has the right to a public hearing by a court or a judge of a first instance.

The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities.[97] Courts must make information

96 *UN HRC, General Comment 32. Article 14: Equality before courts and tribunals and the right to a fair and public hearing, para.28. http://www2.ohchr.org/english/bodies/hrc/comments.htm*

97 *UN HRC, General Comment 32. Article 14: Equality before courts and tribunals and the right to a fair and public hearing, para.28. http://www2.ohchr.org/english/bodies/hrc/comments.htm*

regarding the time and venue of the oral hearings and of the court responsible for conducting the hearing available to the public:

- the state should establish a permanent system of publication of information on court proceedings;
- the necessary conditions shall be provided for the interested members of the public to be present at the hearings;
- all hearings must be open to the general public and must not, for instance, be limited to a particular category of persons;[98]
- media representatives are entitled to attend the proceedings and broadcast, except in cases where a court or a judge may limit the use of audio and video equipment during the proceedings.

Under exceptional circumstances, the court or the judges are authorized not to exclude the public, including the media, from all the hearing or a part of it. These circumstances are limited to the following situations:

- when it is strictly necessary to protect the interests of justice (for example, for the protection of witnesses);
- when it is necessary for the private life of the parties (for example, in cases of a juvenile court, in cases where minors or children are the victims of a crime, or in case of the need to maintain privacy of victims of crimes against the sexual inviolability and sexual freedom of the individual);
- when it is strictly necessary for the reasons of public order, morals or national security reasons in an open and democratic society where human rights and the rule of law are observed.

Nevertheless, any such restriction must be strictly justified and evaluated in each case and be subject to close monitoring by the court.

The laws ensuring conducting criminal proceedings in camera, as coercive and general without taking into account the specific characteristics of each case are the violation of international standards of in the sphere of human rights.

Even when the restriction of the right to a public hearing is admissible, the defendants have the right to attend a hearing before a court or a tribunal, which holds a hearing on their case.

Legislation provides for the criminal procedure to be only in writing and shall not admit the conducting of any form of oral investigation, does not correspond to the principles of a fair trial.

States shall ensure the existence of all trials protocolling system, documenting this information and make it available to the general public. All decisions made in the course of criminal proceedings, shall be published, and access to them shall be ensured to everyone in all the territory of the state. Even in cases where the public is not admitted to the hearing, the decision, including the substantial facts, key evidence and legal reasoning, must be made public, unless it is contrary to the interests of minors.

The right to a public hearing is guaranteed by the Constitution of the Republic of Belarus, which provides that "[t]he trial of cases in all courts shall be open. The hearing of cases in close court session shall be permitted only in the instances specified by law and in accordance with all the rules of legal procedure." The CPC echoes this guarantee and lays down the permissible grounds for closed-door hearings (CPC, Article 23(1)). A hearing may be held in camera in cases involving state secret and other classified information; involving defendants under 16 years of age; concerning sex offenses or where privacy and/or dignity of a participant in the proceedings may be put at risk; as well as where a public

98 UN HRC, General Comment 32. Article 14: Equality before courts and tribunals and the right to a fair and public hearing, para.29. http://www2.ohchr.org/english/bodies/hrc/comments.htm

hearing would threaten the security of the victim, a witness or another participant in the proceedings, or a family member/loved one of any of those listed. In closed-door hearings the disposition of the final judgment is publicly pronounced, but not the rest.

Both trial courts and appeal courts review cases in open hearings. There is no corresponding requirement of openness with regard to the so-called "oversight" (last instance) proceedings, which are held in camera and without the presence of the defendant or the attorney. Moreover, hearings to review the lawfulness of detention on remand are conducted in camera (CPC, Art. 144 (2)).

Although the defence counsel, the victim and the defendant's legal representative have the right to participate in the hearing, there is no provision whereby the defendant him or herself would be required, or even entitled, to participate.

Where the case file includes private correspondence, telephone communications, and/or audio/video recordings of private nature, the law requires that the consent of the parties to the communication be obtained in order that such evidence may be presented in a public hearing. In the absence of such consent, the hearing must be held in camera. The law also allows those present in a public hearing to take notes and make audio recordings. Photography and video recording may only be done if authorized by the presiding judge and provided the parties to the case consent.

Within five days following the pronouncement of the judgment, copies of it must be delivered to the defendant, the defence counsel, and the prosecutor. The victim, any civil plaintiffs, civil defendants, and their representatives are also entitled to receive the judgement — but they have to petition the court. Importantly, the law does not mention others having access to the decision. This is despite the Constitution safeguarding the right of citizens of Belarus "to receive, store, and disseminate complete, reliable, and timely information on the activities of state bodies and public associations, on political, economic, and international life, and on the state of the environment."

The courts are also not obliged to publish their judgements for public access. Thus, Belarusian law concerning the right to a public trial falls short of international standards on two fronts: the failure to grant public access to judgements and the failure to allow a defendant to be present at his or her detention hearing.

All trials on the events of 19 December were held in the courtrooms.

It should be noted that in a number of cases the public was unable to follow court proceedings due to poor acoustics, inaudible responses from the parties and witnesses, or the unintelligible reading of documents by court officials, as it was during the trial of Lihovid on March 22, 2011. Although courtrooms appeared to be equipped with sound-amplifying systems, they were not switched on. The screens were turned away from the public so that it was not possible for them to view the content. All of this hindered the meaningful exercise of the right to a public hearing. The aforementioned presence of security personnel also had its impact on the public nature of the trial. The overt presence involving the individual identification of each entrant, their being filmed, and their conversations inside the courtroom being monitored, will have acted as a deterrent to some sectors of the public.

It should be noted that the public attendance of the trials was limited due to the artificial limitation of the number of those present in the courtroom.

The significant number of seats was occupied by the above-mentioned operatives, and on some occasions law students or the Academy of Ministry of the Interior students occupied entire rows. Moreover, there have been cases of unjustified occupation of seats by persons indifferent to the process. With high public interest in these processes, the remaining number of seats was not enough for everyone.

There was no access to the courtrooms for the international NGO monitors, in particular, international NGO monitoring effort called "The International Observation Mission of the Committee on International Control over the Situation with Human Rights in Belarus". The Mission comprised NGO representatives from a variety of neighbouring countries and observed the trial procedures alongside with the other members of the public. In apparent violation of OSCE commitments, these monitors were expelled from Belarus.

Not a single member was allowed to remain and attend the hearings. The inconsistencies should be noted among the various trials as to the nature of materials and the manner in which they were made public. Also inconsistently applied is the practice of what is actually read out during trial from the prosecutor's case file — a practice which had a negative bearing on the implementation of the principle of orality and immediacy in the examination of evidence.

According to the CPC, the prosecutor compiles the evidence against the defendant and — after providing the defence team an opportunity to review the evidence — submits the entire package of evidence to the judge. During trial, the judge reviews this evidence in front of the parties. Written materials are usually read out. During the monitored trials the prosecutor or the judge sometimes simply stated what the document was, while at other times its content was read out in full — usually rather quickly making it difficult to follow and to comprehend. The same inconsistency extended to video and other material.

The mere fact of inconsistent practice is not per se detrimental to a defendant's fair trial rights, so long as the decision as to what is read or seen, is not manipulated in favour of the prosecution's case. However, it has a negative impact on transparency of a trial.

3.4.3. The Presumption of Innocence

According to article 14, paragraph 2, everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

UN HRC, General Comment 32 (paragraph 30) lists the following components of this principle:

- the burden of proof rests with the prosecution;
- no guilt can be presumed until the charge has yet been proved beyond a reasonable doubt;
- all doubts are resolved in favour of the defendant;
- persons indicted must be treated in accordance with this principle.

All public authorities shall refrain from prejudging the outcome of the trial, for example, refraining from making public statements affirming the guilt of the defendant. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence.

The right to be presumed innocent until guilt is proved according to law is the absolute right that cannot be derogated and that cannot be limited.[99]

The Constitution of the Republic of Belarus does not expressly guarantee the right to be presumed innocent. The closest provision is in Article 26: "No one may be found guilty of a crime unless their guilt is proven under the procedure specified in law and established by the verdict of a court of law... A defendant shall not be required to prove his innocence."

Nevertheless, an express guarantee of the presumption of innocence is found in the CPC, Art.16, where the defendant "shall be considered innocent until his or her guilt has been proved pursuant to the procedure established by this Code and confirmed by a convicting court judgement in force."

99 UN HRC, General Comments 29 and 32. http://www2.ohchr.org/english/bodies/hrc/comments.htm

The Code prohibits placing the burden of proof on the defendant, entitles the defendant to the benefit of the doubt, and requires that a convicting judgment be based on the totality of evidence supporting the defendant's guilt. Convictions may not be based merely on assumptions (Article 356, CPC).

Concerning restraint measures during trial, the law authorizes the use of restraints where the defendant engages in disobedience or resistance, or else poses a risk of flight or danger but only where other means of control are impractical. The law does not, however, expressly mention confining metal enclosures (cages), commonly used in Belarusian courtrooms for defendants, as a means of restraint.

Belarusian legislation generally meets the demands in international human rights law with respect to the presumption of innocence.

However, analysis of the trials related to the events of December 19 generates a reasonable doubt that the defendants were actually presumed innocent until proven guilty in accordance with law.

In a number of instances the sources within the state apparatus portrayed the defendant in these cases as guilty, thus violating the legislative requirements.

The newspaper *Soviet Belarus*, which was founded by the Presidential Administration and continues to be its official media outlet, published in print, online and in video format a collection of materials setting out the case against the opposition candidates and those involved in the 19 December events.

Published in the weeks following the events, the materials portrayed several defendants as conspirators to overthrow the President, publishing personal information about them and generally presenting them in highly negative terms.[100] In addition to the video and online materials aired by the state media outlets, information concerning comments made by individual public officials gave further cause for grave concern that the presumption of innocence had been compromised.

On December 20 President A. Lukashenka held a multi-hour press conference. The event was broadcast live on television. In his remarks, the President implicated several of the former presidential candidates, in particular V. Nekliaev and V. Rymashevskiy, in the events of the previous evening and described the criminal activity they allegedly perpetrated. Subsequently the President ordered the security services to "declassify" materials and release them to the public, which was done as described above.

Another article reprinted his description of the events of the 19 December, quoting him as having said: "the opposition was preparing a *coup d'etat*, that's right — no more and no less. Everything was planned under the tight control of some foreign intelligence services."

Statements by judicial professionals having high positions within the court hierarchy are of particular concern — especially when they are within the direct hierarchy of the courts hearing the cases in question.

While trials were still ongoing, the deputy Chairperson of the Supreme Court V.Kalinkovich participated in an interview along with a university professor of criminal law and a representative of the prosecution.

The broader goal of the televised broadcast was to explain the charges connected to the events of the 19 December to the broader public. However, to the extent the guests, and especially the Supreme Court member, gave their opinions on the circumstances of these cases and the manner in which the law should be applied — and that those state-

100 Trial Monitoring in Belarus (March – July 2011) p.: 66, OSCE/ODIHR Report. http://www.osce.org/odihr/84873 (eng.)

ments operated to the detriment of the defendants — such actions impinge on the defendants' rights to the presumption of innocence.[101]

The above comprise a sample of the numerous statements and materials put into the public sphere after the events in question. They leave little doubt as to the position of the state apparatus with respect to the actions of the defendant and the liability such actions entail. Belarus created a practice without exceptions, in accordance with which a defendants in custody is held in the cage in the courtroom. These defendants are brought in and out of the courtroom in handcuffs. If the case arouses public interest and the trial is broadcast by the media, then these very episodes are posted. Thus, from the first day of the trial the defendant appears before the court and society in the guise allowing associate him with a dangerous offender. This occurred in all the trials relating to the events of December 19. It appears that individual security measures applied to the defendants were unjustified and not balanced against the need to uphold the presumption of innocence.

The fact that the presiding judge appears to be familiar with the prosecution's case already at the beginning of a trial should be noted as a violation of the above-mentioned principle.

Receiving the entire prosecution case in advance, however, has the unfair effect of exposing the judge at this critical early stage to the prosecution's evidence.

Through the statements of defendants and witnesses at trial it became obvious that some evidence pertaining to the cases 'leaked' and was eventually broadcast in the media. Some of this leaked information could only have been in the control of the investigating authorities. For example, an interview with the defendant Nikita Lihovid by an investigative officer was broadcast on local television.

Another piece of evidence, an intercepted phone call, was leaked to the public. Defendant Statkevich was recorded by state security forces as he stood in Independence Square on the night in question speaking on his cell phone. The caller was apparently an acquaintance of M. Statkevich from Ukraine. According to the evidence at the trial, which included playing a recording of the phone call, the acquaintance encouraged M. Statkevich to enter the House of Government and take over the seat of the Prime Minister. This phone-intercept recording could only have been in the possession of state authorities, one of whom deliberately placed it in the public arena. Irrespective of whether M. Statkevich committed the crime charged, this leaked phone call will have served to provoke a negative public reaction and will have undermined his right to a presumption of innocence.

The publication of this conversation was also noted during the trial. At one point the judge, in line with the requirements of the CPC, asked M. Statkevich whether he wanted the wire-tapped evidence to be read out in camera or during the public session. M. Statkevich responded by saying: "It's funny you ask that now — after the conversation has been aired on TV so many times."

Yet another form of the violation the defendants' right to the presumption of innocence appeared at the beginning of the proceedings when the defendants' court records were read out. In accordance with the international standards the defendant can be tried only on the basis of evidence submitted to the court and relevant to the inflicted crime and not on evidence of committing other crimes.

3.4.4. Right to Defence

According to international treaties on human rights, the right to defence is one of essential features of the right to a fair trial. Which in turn is an essential element in the protection of human rights and serves as a procedural means to ensure the rule of law.

101 Trial Monitoring in Belarus (March – July 2011) p.: 67, OSCE/ODIHR Report. http://www.osce.org/odihr/84873 (eng.).

Thus, everyone charged with a criminal offence has the right for the hearing of his case and to the following minimum guarantees as:

- to have sufficient time and facilities to prepare his defence and to communicate with the defence counsel of his own choosing;
- to defend himself or through legal counsel of his choosing;
- in the absence of defence counsel to be informed of that right;
- to be provided with a defence counsel appointed to him or her in any case, free or state-funded legal assistance when the interests of justice so require and the defendant is indigent.

Similar guarantees are enshrined by the European Convention. The UN Basic Principles on the Role of Lawyers (Principle 1-4) also affirm the right of every person to counsel and encourage States to develop effective procedures to ensure "effective and equal access to lawyers". Enshrined in international law, the concept of justice requires that the defendant had the opportunity to use the services of a lawyer already at the initial stages of police interrogation. ICCPR requires a "prompt access to a lawyer," that is, within 48 hours.[102]

The lawyer should be able to meet with his client and to communicate with him or her in conditions that ensure complete confidentiality of communication. Interference with a lawyer from the moment of detention, and certainly within the first 48 hours of it, for any reason is a violation of the defendant's rights under Article 14 (3) of the ICCPR. Violation of the right to a defense is in place if the detainee is not allowed to correspond with the attorney.

In accordance with international standards, in cases where the interests of justice so require, the indigent defendant must provide free or state-funded legal aid.

Relevant international standards provide that the State shall provide sufficient funds to prepare a defence. Such tools should include access to documents and other evidence which are necessary for the defendant to prepare for the hearing of his case as well as the ability to communicate with a counsel. The UN Committee on Human Rights, specifically stated that "lawyers should be able to advise and represent their clients in accordance with established professional standards and judgment without any restrictions, influences, pressures or undue interference".[103]

Article 62 of The Constitution of the Republic of Belarus sets forth the right of everyone to legal assistance by providing that “[e]veryone shall have the right to legal assistance to exercise and defend his rights and liberties, including the right to make use, at any time, of the assistance of lawyers and one's other representatives in court, other state bodies, bodies of local government, enterprises, establishments, organizations and public associations, and also in relations with officials and citizens.”

In doing so, it expressly provides for the entitlement to free, state-funded legal assistance in cases specified by law.

The CPC further details the right to legal assistance by providing that every suspect or defendant in a criminal case has the right to defend him or herself in person or through the legal assistance of a defence counsel, with the ensuing obligation on the part of the criminal proceedings body to explain to the person in question their rights and facilitate the exercise thereof. The Code does not, however, expressly entitle the defendant to representation by a counsel of his or her own choice, although this right may be implied from its provisions.

The CPC further affords every suspect and defendant the right to unimpeded access

102 UN HRC, General Comment 32. Para.34http://www2.ohchr.org/english/bodies/hrc/comments.htm

103 UN HRC General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law, 13 April 1984, §9. http://www2.ohchr.org/english/bodies/hrc/comments.htm

to and assistance by their defence counsel from the moment of their detention or indictment, respectively, including the right to communicate with the defence attorney without hindrance.[104]

The body conducting the proceedings is expressly banned from recommending a defence counsel. The defendant has the right to invite more than one counsel. The defendant's refusal of defence counsel's assistance does not bar him or her from requesting representation by counsel at a later stage. If the defendant requests such representation before the trial, the request cannot be rejected. Although the law does not expressly guarantee one's choice of counsel, the fact that the body conducting the proceedings is expressly banned from recommending a defence counsel may be construed as a safeguard allowing the defendant this choice.

If the defendant does not have a counsel, but wishes to be defended by a counsel, the counsel will be appointed by the Bar of the Republic of Belarus (CPC, Article 46(2)).

The legislation on the bar provides for some safeguards of quality legal assistance, such as the requirement that a candidate for bar membership have at least three years of legal experience or have completed a six-month internship with the Bar, as well as the requirement that the candidate pass a qualification examination. The legal framework governing the right to counsel in Belarusian law appears to be in line with international standards. With regard to the observance in Belarus the guarantee to defend oneself through legal assistance of his or her own choosing, attention should be paid to the events that took place after December 19, 2010.

Various human rights organizations have filed cases of the denial of lawyers' access to the arrested after the events of 19 December.[105]

Thus, the review of trials in Belarus (March – July 2011) ODIHR learned of four instances where lawyers defending persons defendant in relation to the 19 December events lost their licenses to practice law; one other was disbarred. The monitors learned anecdotally of instances where some defendants, particularly those with a political profile, had difficulties finding a lawyer subsequent to the mentioned de-licensing. Lawyers appeared reluctant to represent these suspects, as the lawyers were aware their actions would be the subject of scrutiny by the domestic licensing authorities. In cases observed, all defendants eventually found representation, but to the extent the defendant were deprived of the counsel of their choice because lawyers were afraid to accept their case, this important right has been undermined (§§ 218, 220 of the report).

The monitors also evaluated the overall performance of the defence. The impression formed was that the quality of counsel varied substantially. Monitors did not assess that any single lawyer was so ineffective that a violation of this fundamental right may have ensued. Still, some lawyers failed to challenge controvertible evidence, failed to submit motions that would have benefited their clients, and failed to seriously cross-examine prosecution witnesses — particularly when those witnesses were police or otherwise belonged to the state apparatus.

It appears highly probable that the fact that some lawyers lost their license to practice law for alleged misconduct connected to these cases will have had a dampening effect on this important advocacy role.

104 See the CPC Articles 41, 43.

105 See, for example: Human Rights Watch Report, «Shattering hopes : post-election crackdown in Belarus», chapter [Access to the defence counsels]. http://www.hrw.org/sites/default/files/reports/

belarus0311enWeb.pdf

See also: the Committee on International Control over the Human Rights Situation in Belarus. Analytical Review No.3-1 "Realization of the right to protection and freedom of the legal profession in the light of the events in the Republic of Belarus during December 2010 – January 2011", http://hrwatch-by.org/en/analytical-review-3-1

It was clear to the monitors that some lawyers felt that if they defended their clients too assertively they might suffer professional repercussions.[106]

3.4.5. The right to Attend the Trial

Defendant persons are entitled to be present during their trial to hear and to object to the prosecution position and present his defense.

The defendant has the right to personal presence at the tribunal or the court throughout the proceedings. This right imposes a duty on public bodies to advance awareness of the defendant (and his lawyer) the date and place of the trial, demonstrating the need for the presence of the defendant and to prevent improper exclusion of the defendant from the trial.

This right is a component of the right to defence and allows a person to submit arguments in his defence in person to the court along with the arguments of the prosecution.

General comments 34 HRC explain (paragraph 36) that the proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.

These provisions are implemented in the Belarusian legislation, if we talk about hearing a case by the court of first instance. Article 294 of the CPC provides for the mandatory participation of the defendant in the trial at this stage, except for the cases when a person pleads guilty in committing a crime of not a serious public or a less serious crime, and makes motions to consider the case in his absence, as well as the defendant's avoiding from the appearance, if he is outside of the Republic of Belarus.

However, at the stage of cases being review at the cassation instance law does not guarantee the participation of the defendant in the proceedings to the similar extent that it is provided for the first instance.

As a general rule (Part 1 of Art. 382 CPC) participation in the cassation proceedings is the right, but not the obligation for the participants. But the exercise of this right by the persons in custody or under home detention is dependent on the actions of the court, which accepts or does not take measures to deliver them to the court.

The law requires the mandatory participation in the hearing on appeal of those sentenced to death (Part 3 of Article.382, CPC). To all other persons, until recently the need for their participation was decided by the court, and almost never such a person was brought before a court.

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On January 3, 2012 the changes were made in this part of the Criminal Procedure Code, and as amended, the right of the persons in custody and home detention to participate in the court of cassation was extended. Now, if the case is reviewed on the complaint of the defendant or by the prosecutor's protest on the grounds which can lead to the deterioration of the defendant's situation, he shall be called to the court if he submits the motion (Article 382, part 3 of the CPC). Thus, the defendant in this case, when he is willing to do it, has the opportunity to put forward arguments in his defense directly before the court of appeal.

106 Trial Monitoring in Belarus (March – July 2011) p.: 67, OSCE/ODIHR Report. http://www.osce.org/odihr/84873 (eng).

However, this guarantee is still not available to the persons who are in custody or home detention, they appealed the sentence themselves or through the defence counsel and asked the court of second instance court to dismiss the case (in fact, the recognition of innocence), or a reduced sentence. The law does not provide for the obligation of the court to take action to hearing such persons. And in practice, their motions to be called to the hearing for giving evidence are not satisfied by the court.

However, according to international practice, the procedure of the review of judicial decisions shall satisfy the principles of a fair trial. And if the higher court examines not only the legal issues, but the facts as well (such as the questions of guilt or innocence), the right to be heard by the court in person should be implemented. Therefore, it is necessary to admit that the absence of such a guarantee in the Belarusian legislation for all persons in the reviewing of their cases by a cassation instance does not meet international standards.

It should also be noted that, despite the parties' optional participation in cassation proceedings, in practice the prosecutor takes part in the cassation on all cases and makes conclusions that are to influence the opinions of the court. In this situation, the involuntary absence of the defendant is a violation of the principle of the adversary process.

The proceedings prescribend by the CPC appear to be even less conforming to this principle.Thus, under Art.411 Part 3 of the CPC, if a criminal case is reviewed by oversight cassation then the participation of the prosecutor of the appropriate level is necessary. The convict or acquitted, and his lawyer can be invited to this court session, "in the case of necessity", and only then the opportunity to get acquainted with the protest is available. Taking into account that the reviewing authority may also consider the issues of the facts including the person's guilt, the deprivation of the person of his right to give the explanations at this stage must also be regarded as a violation of the principle of adversary. This is even more evident when the prosecutor filed a protest and support the position against the interests of such convicted, acquitted, and the latter does not have a guaranteed opportunity to put forward arguments in his own defence.

It should be noted that none of the defendants in criminal cases on the events of December 19, held in custody, were brought to the court of cassation and oversight authority, regardless of the submitted motions for a hearing in their presence.

3.4.6. The right to the Equality of Arms (the Principle of Equality of Arms)

Each party shall be in an equal legal position throughout the proceedings, meaning that they are entitled to equal treatment before the court and they have the same legal and procedural tools available to them, both in law and in practice (Article 14, paragraph ICCPR).

In the criminal proceedings the principle of the equality of arms requires procedural equality of the defendant, the prosecution and all other parties in the process (for example, the victim, in his capacity as a civil plaintiff).

The principle of equality of arms means that:

- at any stage of the trial, none of the parties shall be placed at a distinct disadvantage relative to his opponent;
- everyone charged with a criminal offence may avail of the right of “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- the defendant has the same legal authority as the prosecution, to ensure the compulsory attendance of witnesses for conducting examination or cross-examination;
- the defendant, the prosecution and all other parties of the proceedings have the same rights to ensure the attendance and examination of witnesses as experts, and others who may contribute to the truth of the case;

- the treatment to the witnesses for the prosecution and the defense must be equal on all procedural matters;
- the prosecution and the defendant have the same rights to appeal court decisions; the principle of equality of arms is not observed if, for example, the right to appeal the decision is subject to the prosecution, not the defendant;[107]
- each of the parties must be given the opportunity to contest all the arguments and evidence presented by the opposing party;
- the defendant should have the right to prove his innocence on the same conditions on which the prosecution obtained evidence of his guilt;
- any expert for the defense should be given the same opportunities as a specialist summoned by the prosecution;
- all parties should have equal access to the protocols, documents, and evidence contained in the case file;
- the prosecution and defense must be given equal time for the presentation of their evidence.

The UN Committee on Human Rights has stated that a fair hearing requires a compliance with a number of conditions including equal opportunity, respect for the principle of adversarial and due process. Differences are allowed in certain areas, but they shall be envisaged by law and be justified on objective and reasonable grounds not putting the defendant in an unfavourable position and not subject him to any other ill-treatment. In criminal proceedings, where the prosecution is backed by the support and resources of government agencies, the principle of equality of arms is one of the most important guarantees.

The principle of equality in court proceedings in Belarus is set out in Article 22 of the Constitution, "All shall be equal before the law and entitled without discrimination to equal protection of their rights and legitimate interests." [108]

The CPC provides that criminal proceedings shall be adversarial and shall be conducted based on the principle of equality of arms.

The CPC specifically stipulates that "parties to the proceedings shall enjoy equal rights to present and review evidence, to file motions, to state opinions on any issues relevant to the criminal case, [and] to present closing arguments." The law further allows both the prosecution and defence to collect and produce evidence, declare challenges and objections to the evidence produced by the other, file motions, and otherwise participate in the court's investigation of the case file during trial.

Yet by enumerating the instances where equality is ensured, the law implies that in other areas they may remain unequal.

Under the CPC Art. 139, unlawful acts and decisions of the "body conducting the criminal proceedings" may be appealed, however, not directly to a court. The appeal, rather, is submitted to the prosecutor.

The only safeguard against bias in such cases is a prohibition on review of that appeal by the same prosecutor who issued or approved the impugned decision.

Despite its declaration that the principle of equality of arms is guaranteed in the Belarusian law, the provisions of the CPC provide greater powers to the prosecutor than the defence. Unless these differences are "justified on objective and reasonable grounds," and do not entail "actual disadvantage or other unfairness to the defendant" they run counter to applicable international standards mentioned above.

According to the Criminal Procedure Law of the Republic of Belarus, at the case hearing the prosecution is the first to present their evidence, also prior to the court investigation

107 UN HRC, General Comment 32, § 13http://www2.ohchr.org/english/bodies/hrc/comments.htm

108 UN HRC, General Comment 32, § 13. http://www2.ohchr.org/english/bodies/hrc/comments.htm

the prosecution gives the court the proofs confirming, in their opinion, the guilt of a person in committing the crime (Article 325, CPC). This is, as a rule, the evidence gathered during the preliminary investigation. Moreover, the prosecutor may submit additional evidence directly to the court.

Defence presents evidence by making motions for the admission of the available documents and their research, for the court's sending the necessary inquiries to obtain the necessary information, for the attendance and examination of witnesses and some other actions (inspections, expertise, etc.). The submission of the evidence that are not a part of the materials prepared in the course of pre-trial, the prosecution and the defence shall prove in order to establish exactly which circumstances need additional evidence (Part 2 of Article 322, CPC).

The parties are heard on each of the submitted motions and the court decides whether to satisfy or dismiss the motion. The court may not refuse only the examination of the additional witness who has already appeared in court (Part 3 of Article 322, CPC).

Out of the above-mentioned rules the following practice was formed, according to which the public prosecutor at the sole discretion determines which of the evidence obtained in the course of pre-trial proceedings, will be presented in court, he should announce it before the trial. As for the written and other materials of the case (for example, video and audio), the prosecutor reads out to the extent which he himself considers necessary, notwithstanding the fact that some of these materials cannot or shall not influence the decision. Theoretically the defence may object to the presentation or the research in the court of any prosecution evidence, on the grounds that they were obtained illegally or are not relevant to the charges. But almost always the court informs the defence that the relevance and admissibility of the issues will be decided after the investigation of such evidence per se, at the sentencing stage, and the defence counsel can express his views on this subject in the pleadings.

The number of the prosecution motions for inclusion, requirement and research of new evidence is insignificant, although the majority of such requests are satisfied by the court. There is a different attitude to the defence motion. The court always requires a clear justification for these motions; otherwise it is rejected as unreasonable. Although it is often difficult for the defence counsel to determine whether the materials about the recovery of which he asks the court, will contain the information necessary to decide the case (e.g., the request of information about the identity of the witness or the victim in order to verify the accuracy of their testimony). In addition, despite the requirement that the decision of the court in respect of such motions shall be reasoned, the court rarely resorts to the need to reason its decision in the case of rejection of their motion, and almost never gives reasons for its decision in a separate document. And, finally, the courts rarely satisfy defence motions that require considerable time and effort (for example, for the request for legal aid, judicial examination of the scene, etc.). Widespread is the practice at which the application of the defence for the examination of witnesses, can be satisfied only when the witnesses appear in court. Otherwise, the attendance and examination of witnesses are usually rejected. It is obvious that the defence counsel is not enabled to compel one or another necessary witness to attend a trial.

Thus, in the process of presenting evidence in court the parties find themselves in an unequal position. In practice, this inequality is compounded by a greater degree of confidence of the court to the evidence presented by the prosecution and the defence has fewer opportunities to obtain certain information.

There is an example of such an inadequate approach. In one of the court proceedings of the participants in the events of 19 December 2010 in Minsk on charges of the involve-

ment in the mass riots, the prosecution, as in other similar cases, presented video recording of the events obtained during the investigation. The two sources of information were mentioned: materials filmed by the correspondents of State Television (i.e. information provided by the organization) and "monitoring the internet" (i.e., information is taken from the network by the participants of the investigation). These materials had been studied by the court, and, despite the dubiousness of their origin, and the presence of poor quality installation (what was pointed out by the defence), they were considered the evidence and the ground for the sentence. At the same time, when the defence counsel tried to provide the court with the video materials from similar sources, the court rejected their inclusion and the study: in the first instance court — referring to the fact that there was "enough" video presented by the prosecution, in the appellate court — that they "do not know their source." [109]

3.4.7. The Attendance and Examination of Witnesses

The international human rights framework includes the right of an defendant to examine opposing witnesses — also known as the right to confrontation.

The ICCPR guarantees the right to confront witnesses in the context of criminal proceedings. Its Article 14(3) states the right in the following terms: "In the determination of any criminal charges against him, everybody shall be entitled to the following minimum guarantees, in full equality: (...) (e) To examine, or have examined, the witnesses against him."

The right of the defendant to call and examine witnesses is not absolute; it is subject to the condition that it be applied "under the same conditions as witnesses against him".

The applicable international standards indicate that when a witness is unavailable at trial, the court should not base a conviction on the evidence extracted from that witness's affidavit, except under very narrow circumstances. However, where the defendant is given an opportunity to challenge the affidavit at the pre-trial stage or if the defendant is present during the taking of the affidavit and was able to put questions, admission of the evidence will not in itself run counter to the international standards. Where a conviction is based "solely or to a decisive degree" on affidavits given by a witness that the defendant cannot confront, whether at the pre-trial or trial stage, the defence will have been put at a disadvantage that is incompatible with international law.

The defendant has the right to be present when the testimony of any witness and personally conduct the examination and cross-examination of the witnesses who give testimony against himself. This right may be limited, even though the defendant continues to have the right to a fair trial, if the witness is a victim of sexual violence or minors. Nevertheless, such restrictions should not be interpreted as an admission of the use of secret or anonymous witnesses, and in all cases, the defender has the right to the examination and cross-examination of witnesses for the prosecution.

Testimony of anonymous victims and witnesses in the trial is a violation of due process. It may be admitted only in exceptional cases, for example, if it is necessary to protect the lives of witnesses and ensure their safety, and only at the stage of a criminal investigation, as well as under strict judicial control. In any case, the identity of anonymous victims and witnesses must be disclosed to the defendant prior to the trial in sufficient period of time to ensure a fair trial.

The Constitution of Belarus does not expressly guarantee the defendant in a criminal trial the right to confront and cross-examine witnesses against him or her. Neither does the CPC, in enumerating the defendant's rights, include a specific clause permitting the defendant a right to confrontation.

109 *For example, cases of Bondarenko, Statkevich etc.*

However, as a rule all relevant evidence must be reviewed at trial, and the defence does avail of the right to question all witnesses that appear at trial.

The CPC permits reading out affidavits that were made during the pre-trial investigation phase by victims and/or witnesses where

- the testimony given at trial contradicts the testimony given at the pre-trial stage;
- the victim or witness in question is unavailable to attend the trial; or
- safety concerns preclude the attendance by victim or witness.

The decision to read out the pre-trial affidavit is made either by the initiative of the court or upon a motion by one of the parties to the proceedings.

According to Article 14 (2.2) everyone charged with a criminal offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Criminal Procedure legislation of Belarus contains a rule allowing an exception to this principle. Thus, Part 2 of Paragraph 1 of Article 333 of the CPC permits reading out affidavits that were made during the pre-trial investigation phase by victims and/or witnesses where the victim or witness in question is unavailable to attend the trial; it is made either by the initiative of the court or upon a motion by one of the parties to the proceedings. In practice, the courts interpret the reasons that exclude appearance of a witness or victim in the trial too widely, read out the affidavits made by the unavailable witnesses for the prosecution using them to make their own conclusions. The objections of the defense are not decisive in this case.

Another problem lies in the fact that the law permits reading out affidavits that were made during the pre-trial investigation phase by victims and/or witnesses where the testimony given at trial contradicts the testimony given at the pre-trial stage (Paragraph 1 of Part 1 of Article 333 of the CPC). There is a practice when this rule is used in order to "return" the victim to his previous testimony, if at trial, when a prosecution witness recants, forgets, or otherwise changes his/her testimony vis-a-vis the previous statement, the previous statement is read out, and the witness is warned about the liability for perjury both during the investigation and in court. After such "explanatory work" witnesses, as a rule, confirm the written statements given during the investigation. In many criminal cases related to the events of December 19, when before the court a prosecution witness rejected the testimony, forget it or in any way changed it compared to the previous testimony, in court his previous testimony was announced at the prosecution's motion. This occurred as a common practice, and the court almost always accepted the written version for a more credible one. For example, during Myadvedz trial on March 10, 2011 four police witnesses in a row where, after the previously obtained, written statement was read out in trial, the judge asked the witness which version was more accurate and why. The response was almost always the same, "the earlier version, as it was closer to the events".

A similar exchange took place in numerous trials with many of the 29 police officers. The ODIHR experts paid attention to this practice noting that it provides a unique advantage for the prosecution. When affidavits are given more weight than the testimony at trial, the right of confrontation is rendered meaningless as is the purpose of in trial testimony.

This imbalance is exacerbated by the fact that the defence does not have a procedural power to conduct interrogations — and therefore to obtain pre-trial affidavits to be read them out at the trial.[110]

In addition, Article 68 of the CPC provides for the reading out of the witness's or the

110 Trial Monitoring in Belarus (March – July 2011) p.: pp.285, 286, OSCE/ODIHR Report. http://www.osce.org/odihr/84873 (eng.).

victim's affidavits, if they are excluded from the appearance in the court due to the security measures taken to them. Thus, it is spoken about the use of anonymous testimony of anonymous victims (witnesses) in a case is tried.

This provision of the law excludes the possibility of the defence to interrogate the "anonymous" victim-witness, and in case the measure is applied to them to disclose information about his personal data — and then evaluate his testimony correctly. This situation, as noted earlier, occurred during Dashkevich and Lobov criminal trial.

Article 330 of the CPC provides for the interrogation in the court. The list of persons to be summoned to the hearing shall be made by the investigator when he submits the case to the court. Thus, the prosecution has the advantage in the formation of the list of persons invited as witnesses. Whereas the defence witnesses may be interrogated by the court only if they appear in court. Otherwise, the interrogating of defence witnesses, summoning them to the hearing is at the discretion of the court. In practice it often entails the objection in interrogating the defence witnesses, as "there is no need", it is regarded as "delaying the process" which limits the access of persons and their counsels to the evidence and undermine the equality of arms in the proceeding.

This inequality of arms was compounded by the fact that the defence is deprived of procedural powers to conduct interrogations and, consequently, cannot obtain written affidavits at the pre-trial stage.

Due to the fact that Belarusian law does not insist on the right to confrontation, and in fact permits affidavits to be entered into evidence in situations where the defence has not been able to question the defendant, the provisions fall short of international standards.

3.4.8. The Right Not to Be Compelled to Self-incrimination or to Testify against Oneself

No person defendant of a crime can be compelled to confess guilt or to testify against himself. This right is closely connected with the principle of the presumption of innocence and the absolute prohibition of torture and other cruel, inhuman and degrading treatment. This right does not allow any exceptions[111] and means the ban of any pressure — physical or psychological, directly or indirectly exerted on the defendant by the investigative or judicial authorities to compel to testify against himself and to obtain a confession.

The defendant's right to remain silent at a trial means the right not to be compelled to testify against himself or to confess guilt. The silence of the defendant should not be considered or interpreted as the acceptance of the charge or liability or as the admission of guilt.

The Constitution of the Republic of Belarus in Article 27 states that "no one shall be compelled to give testimony against oneself, family members, close relatives." The CPC provides for the right of the suspect or the defendant "to testify or refuse to testify" (Part 2of Article 41, Part 2 of Article 43, CPC).

Criminal Procedure Law of the Republic of Belarus directly prohibits the interrogation of suspects as witnesses, and requires that the rights of the suspect shall be explained to a person arrested on suspicion of committing a crime (Article 110 Part 1 of the Code).

Although the article of the CPC which contains this requirement does not directly mention the right to refuse to give evidence but, it is clear that the right to refuse to testify is available due to the links to other provisions of the Code the article contains. The CPC requires that upon indictment the defendant be given a warning similar to the abovementioned. The investigator is required to inform a person that is summoned of the capacity in which he or she will be questioned.

111 UN HRC, General Comments 29 and 32, para.6. http://www2.ohchr.org/english/bodies/hrc/comments.htm

That explanation must also set forth the relevant rights, including the right not to testify against him or herself and/or family members. At trial, the CPC mandates the presiding judge tox "explain to the defendant his or her right to testify in connection with the charges and other circumstances of the criminal case and draw the defendant's attention to the fact that anything that he or she says may be used as inculpatory evidence."

However, noteworthy is the fact that the testimony of the defendant at a trial are presented as the proofs of the prosecution, which entails from the provisions of Article 327 of the CPC, under which the interrogation of the defendant at a trial, if he is willing to testify, is conducted by the prosecution going first. But it is not consistent with the fact that the burden of proof lies on the prosecution but the right to defence is primary for the defendant, and in the proceeding he defends himself, both personally and through the defence counsel.

Moreover, the provisions of paragraphs 1 and 2 of Part 1 of Article 328 of the CPC allow to read out the pre-trial statement of the defendant or to present audio records of his or her statement, video records of his or her interrogation, the decision is taken by the court on its own initiative or upon a motion by a party to the case, it takes place when the defendant refuses to testify at the trial or in case there sufficient controversies between the previous testimony and that given at the trial.

So actually, the defendant's right to refusal to testify is undermined. This standard is widely used by the Belarusian courts. Quite often are the situations when the court nearly always accepts the pre-trial affidavits of the defendant as more credible than the in trial testimony.

Thus, as a rule, the statements about the direct and indirect duress of the defendant to give certain testimony at the preliminary investigation are not properly checked and are not taken into account. In case the defendant exercises the right to refuse to testify in the court, his confession at the stage of pre-trial investigation are used by the prosecution to prove his guilt and generally make the basis for the conviction. Also, there are instances when a failure of the defendant to report certain information to the court gets the negative assessment in the sentence and it is the basis for finding the defendant guilty. Similar facts took place in court proceedings connected with the events in the Square. This practice indicates the reversal of the burden of proof on the defendant and does not meet international standards.

3.4.9.Exclusion of Unlawfully Obtained Evidence including Tortures or Maltreatment

"Any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person defendant of torture as evidence that the statement was made." This prohibition also applies to evidence obtained through recourse to unlawful method. Relevant international standards could not be clearer in prohibiting any form of compelled testimony — ranging from torture to other forms of ill-treatment or coercion — to be used at trial.

The UN HRC General Comment 20 adopted an inclusive understanding of inadmissible evidence that covers evidence obtained under duress. It requires that domestic law "prohibit the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment." [112]

The UN Guidelines on the Role of Prosecutors prohibit the use by prosecutors of evidence "obtained through recourse to unlawful methods, which constitute a grave violation

112 Guidelines on the Role of Prosecutors, Guideline 16, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. http://www2.ohchr.org/english/bodies/icm-mc/docs/8th/HRI.GEN.1.Rev9_en.pdf

of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights ."[113] Intrinsically related to these prohibitions is the duty upon state authorities to investigate allegations of torture or ill-treatment raised by anyone, but especially criminal defendants. In the international law it is clear that allegations of torture are enough to trigger the obligation of prompt and impartial examination by competent authorities.

State officials, thus, are not free from international legal obligations simply because they themselves do not commit torture. Officials who do not enforce the prohibitions on this international crime, irrespective of who committed it, can themselves be found complicit.[114]

International standards for wire-tapping are connected with the inalienable right of everyone to privacy. According to Art. 17 of the ICCPR, no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 19 of the Code of Criminal Procedure provides that the court and the prosecution bodies in their assessment of evidence are "to be guided by law and their innermost conviction, based on thorough, full, and objective investigation of the totality of circumstances of the criminal case." Each of the evidence shall be evaluated in terms of relevance, admissibility and credibility (Article 105 Part 1 of the CPC). The observance of the rules of evidence collection, according to the norms of the CPC, also means the observance of the rights of the defendant.

Criminal procedure legislation enshrines that the judge, the prosecutor, the investigator and the inquirer shall respect the honour and dignity of the persons involved in the case, that no one shall be subject to torture, violence or other cruel or humiliating or degrading treatment (Part 3 of Article 11, CPC). The CPC also guarantees the right to protection from unlawful interference with one's privacy, including encroachments on the privacy of his correspondence, telephone and other communications, and the right to inviolability of residence and other legitimate possessions (Articles. 13, 14 CPC).

Article 27 of the Constitution of the Republic of Belarus provides that "evidence obtained in violation of the law, has no legal force."

In accordance with Article 105 (§ 4) of the CPC, "where evidence is not obtained in compliance with the procedure stipulated by the [CPC,] it shall have no legal force and cannot serve as a basis for indictment and conviction."

In doing so, the code defines as inadmissible any evidence that was obtained in violation of a citizen's constitutional rights.

Concerning the use of evidence gathered via the use of wiretaps, Article 28 of the Constitution guarantees everyone "protection against unlawful interference with one's private life, including encroachments on the privacy of one's correspondence and telephone and other communications, and on one's honour and dignity."

The CPC permits the interception and recording of voice communications in cases of "grave or especially grave" crimes where there are "reasonable grounds to believe" that the communications are relevant to the case. The power to authorize interception is vested in the Prosecutor as well as the Minister of Interior and the Chair of the Committee on State Security.

113 Guidelines on the Role of Prosecutors, Guideline 16, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. http://www1.umn.edu/humanrts/english/instree/Ri4grp.htm

114 UN HRC General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, http://www2.ohchr.org/english/bodies/hrc/comments.htm

During the pre-trial investigation and trials on 19 December many suspects put their allegations of torture and ill-treatment by law enforcement officials, particularly in the KGB detention centre. In some cases, separate complaints were filed with the prosecutor's office. In addition to physical violence and threats to life, allegations ranged from insults, humiliation and threats, to denial of food and medical assistance and other forms of possibly cruel, inhumane, and degrading treatment.

On the grounds of such allegations some investigations were conducted by the Prosecution office resulting in the decisions to the refuse to institute a criminal case as the facts of tortures and cruel treatment were not proved.

Of particular note were the reactions of judges when allegations of torture and ill-treatment at the pre-trial investigation appeared during trial. In some cases, judges relied on pre-trial statements of the defendants which were conflicting with their testimony made during the trial, despite allegations of duress and intimidation. Other judges reacted to an allegation of mistreatment made by a witness or defendant by questioning the person further.[115]

The judges were generally satisfied upon ascertaining that any statement used at trial had been signed with an attorney present. Only rarely did a judge attempt to gather additional facts concerning the alleged mistreatment. No judge ordered an independent inquiry. Defence motions to exclude evidence based on the alleged maltreatment were either ignored or denied.

Time and again, defendants told the court that they were beaten by the police and suffered from cruel treatment while in custody.

So, on April 12, 2011 the former presidential candidate Sannikov during an open trial at Partizansky Court in Minsk made a public statement that he had suffered tortures for being forced to give the necessary testimony.

In particular, A.Sannikov in his statement listed the following methods of tortures perpetrated against him in the KGB detention center:

• he was not allowed to visit the lavatory for a long time (about 5 hours);

• he was confined to a cell with no place given (he could only stay on the wooden boards under the bunks), where it was very cold;

• in the cell with a place on the bunk he was forced to lie face to "daylight", at night – to a burning lamp on the ceiling ('night'), and if in a dream he rolled over, the whole cell were woken up, he was forced to lie down again in the same position;

• personal searches: he was forced out of the cell with all personal belongings, including a mattress and bedding, he was "driven" by a steep staircase down to the basement, a cold concrete room, forced to strip naked and stand in the "extensions" (feet wider than shoulders) and squat. All this was made by trained masked men (at least three) making "animal cries," banging batons on the walls and stairs, sometimes allowed hits on his back and legs;

• he was led about the detention centre in handcuffs, sometimes locked under his back with raised hands ("swallow");

• blackmail and threats to the life and health of his wife and son (by Zaitsev, head of the KGB, investigators Mironov, Lavrenchuk, officer Fetisov);

• coercive viewing closed-circuit television broadcasting movies with explicit scenes of violence, anti-Semitic films ("Russia with a knife in the back").

In May 2011 Belarusian Helsinki Committee resorted to the General Procurator's Office on Sannikov's statement. The human rights defenders asked to carry out a thorough inspection and initiate a criminal case on the elements of the articles providing the liability for the abuse of power and use of violence by the officials; to make the persons guilty for

115 *See, for example, the protocol of Sannikov trial, May 6, 2011, the interrogation of the accused Gnedchyk.*

all this criminally liable and make the results of the inspection public.[116] The General Procurator's Office redirected the application of Belarusian Helsinki Committee to Belarusian Military Procuracy, the investigator of cases of particular importance A. Halimov stated that under the results of inspection a resolution was passed on the refusal to institute a criminal case as the facts given by Sannikov had not been proved.

Also the investigator emphasized that the results of the inspection are secret as they contain secret liable for the protection by the legislation in force.

During the court investigation the defendants in these cases had been questioned in the absence of their attorney by KGB officers.

ODIHR monitors during the court proceedings monitoring were concerned with this practice, known as "unofficial" questioning, appears to be accepted by participants in the Belarusian justice system because any statement so obtained may not be used against the defendant in court.[117] This practice is, as ODIHR presumes, although not a violation of the letter of the right to remain silent, undermines the protections it offers.

Monitors learned that in many cases instead of the "unofficiall talks" the interrogation of the suspect took place. And only when it was time to sign the report, the suspect was allowed to see his defence counsel. Thus, the defendant Sannikov stated that his lawyer, with whom he had not yet spoken privately, was only allowed to help him edit the statement.[118] Thus, both the role and the purpose of having defence counsel present is undermined.

Example: 'unofficial' questioning of defendant Klaskovskiy.

In the only instance of a pre-trial interrogation being shown to the court during a monitored hearing, the prosecution chose to play a video of defendant Klaskovskiy being questioned. In the clip, Klaskovskiy appears to have been recently arrested as he seems to be somewhat inebriated and is wearing handcuffs. The officials questioning him make a passing reference to lawyers, but do not attempt to explain in clear and comprehensible language the full panoply of rights that inure to someone in Klaskovskiy's position. The video is substantially edited with sections apparently removed. Klaskovskiy makes a number of incriminating remarks. He is shown signing a statement at the end. Just prior to signing the officer warns him about the liability for perjury. However KGB officers did not make any warning about the right to silence, or the rights to an attorney.

Both Klaskovskiy himself and his lawyer objected to this video being played at trial.

To the objection that this statement was taken without a lawyer present, the judge responded, "this is not evidence of an interrogation, we have protocols of all interrogations, this is video evidence." The lawyer further objected to the fact that she had not seen the video prior to trial and although she had seen a transcript, it differed from the conversation in the actual video. The court rejected all objections of the defendant and the defence.

During these court proceedings the prosecution submitted the investigative materials, as a proof, to the court in particular, the telephone conversations.

Every former opposition presidential candidate and many of their representatives had had their communications wiretapped throughout the presidential campaign. Some candidates indicated that they had been tapped well before that. Sannikov stated at trial that the protocol in his case file indicated his phone had been tapped from July 2010, although in the period from July to December 2010 no charges against him were brought.

When the legality of tapping was challenged by a lawyer during trial, one judge simply responded that the "warrants had been authorized".

116 http://belhelcom.org/ru/node/1438

117 Trial Monitoring in Belarus (March – July 2011) pp.: 256, 257, OSCE/ODIHR Report. http://www.osce.org/odihr/84873 (eng.).

118 See the protocols of Sannikov trials, May 6, May 11, 2011.

It should be emphasized that legislation on interception of communications must meet a number of requirements to be viewed as in line with international standards.

First, the standard of proof for authorizing interception must be sufficiently high to serve as a safeguard against arbitrary surveillance.

As mentioned above, the standard of proof for authorizing interception of communications in Belarus is that of "reasonable grounds to believe," which is roughly equivalent to the standard of probable cause and as such in line with the international best practice. Second, in order to ensure that interception be "necessary in democratic society", the law must make an express provision prohibiting interception where other investigative techniques are available. However, as it stands now, the CPC does not expressly require that interception of communications be used only if other investigative techniques have failed or are unlikely to yield evidence.

Third, under Belarusian law it is the prosecutorial (or equivalent) rather than judicial bodies that have the power to authorize interception of communications. This creates a prosecutorial bias in the authorization procedure and a susceptibility to overuse due to the prosecutor's vested interest in the outcome of the case, it does not correspond to international standards.

Fourth, even though the Belarusian law entitles an acquitted person (or an individual against whom no criminal proceedings were instituted) full access to records concerning surveillance measures implemented, there is no corresponding requirement for a criminal defendant, their defence counsel to obtain access to such records once the pre-trial investigation has been completed and the surveillance measure closed. It is, therefore, exceedingly difficult, if not altogether impossible, to obtain access to such records, it may be regarded as deprivation of defendant's (suspect's) procedural rights guaranteed by the norms of international law and Belarusian legislation.

3.4.10. Prohibition of Double Jeopardy *(Ne bis in idem)*

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. Prohibition (the principle *ne bis in idem*) includes the principle of *res judicata*. This provision prohibits the conviction of a person by the same or another court of the same country, if a person has already been convicted or acquitted for the same crime.[119] This prohibition applies to all offences, regardless of their gravity.

Prohibition of double jeopardy for the same offense is applied after a final judgement of conviction, acquittal or dismissing the case took place. This means that for the application of this prohibition all appellate and oversight instances shall be exhausted, or, if it had not been done, so the terms to bring appeals or oversight complaints should be expired. Thus, the prohibition is not at issue if:

- if a higher court quashes a conviction and orders a retrial;
- the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal; [120]
- retrial of a person convicted *in absentia* who requests it, but applies to the second conviction. [121]

This prohibition does not allow new trials or sentences for the same offences or actions in the courts of the same country. But the principle *ne bis in idem* does not apply to proceedings and decisions of the courts of another countries.

119 UN HRC, General Comment 32. Para.54. http://www2.ohchr.org/english/bodies/hrc/comments.htm

120 UN HRC, General Comment 32. Para.56. http://www2.ohchr.org/english/bodies/hrc/comments.htm

121 UN HRC, General Comment 32. Para.57. http://www2.ohchr.org/english/bodies/hrc/comments.htm

In order to enforce a decision to be *res judicata*, and to apply the principle of *ne bis in idem* is important that any such decision should be made by a competent, independent and impartial court or tribunal, and that the trial was held in full compliance with the guarantees of due legal process. When the judgment or decision of the court is a result of a process that does not meet international standards for fair trial or due process, or when they were made of solutions that do not meet the requirements of independence, impartiality and / or competence, the principle of *ne bis in idem* cannot be applied. In such cases it is possible to decide on the resuming of the case and a new trial.

Under Part 6 of Article 3 of the Criminal Code, no one can be held criminally liable twice for the same crime but the existence of a legal rule that allows to bring supervisory protest due to the need to apply the law on a more serious crime, the lenity of the sentence one year after the court decision comes into force, in practice, may level this legal guarantee (Article 406, CPC).

In order that a court decision have the force of *res judicata*, and to apply the principle of *ne bis in idem* it shall be taken by a competent, independent and impartial tribunal established by law and that the trial was held in full compliance with the guarantees of due legal process. When the sentences or decisions of the court are a result of a process that does not meet international standards for fair trial or due process, or when they were made out of the solutions of the bodies that do not meet the requirements of independence, impartiality and / or competence, the principle of *ne bis in idem* cannot be applied. In such cases it is possible to decide on the resuming of the case and conducting a new trial.

Under Part 6 of Article 3 of the CC, no one can be criminally liable twice for the same crime. But the existence of a legal rule that allows to bring oversight protest due to the necessity to apply the law on a more serious crime, the lenity of the imposed punishment and the acquittal one year after the court decision comes into force, in practice, may level this legal guarantee (Article 406, CPC).

HRC practice suggests that the requirements set out in Part 6, Article. 3 of the CC should be interpreted in the framework of the general principles of the inadmissibility of double jeopardy for the same act, regardless of whether the rules of administrative or criminal law is provided.

The violation of this provision concerns a number of participants of the events 19.12.2010 who had been sentenced by the courts to administrative arrests and fines, in addition to which criminal proceedings were being instituted under the title of "mass riot" and "grave violation of public order".

They had served the administrative arrest and had paid fines. The administrative judgements were not cancelled though the criminal proceedings to them were initiated. These facts occurred with the defendants: Kirkevich, Myadvedz, Loban, Lihovid, Mirzayanau, Halip etc. It should be borne in mind that when it comes to the inadmissibility of a double jeopardy, the main thing is to prove that the application of the articles of administrative and criminal legislation covers the same part of the offence.

If they are just similar, but, nevertheless, have different elements (subject / object / subjective side / objective side), this double conviction would not be a violation of this principle.

3.4.11. Right to Public and the Reasoned Court Decision

"Any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires. Everyone found guilty or non-guilty by a court has the right to get acquainted with the judgment rendered in a criminal case, including the essential findings, evidence and legal reasoning of this case.

The court decision is considered public if it is pronounced orally at the trial open for

public or if the decision was published and it is available for any interested party. Public knowledge of court decisions cannot be secured by confining information to a limited group of persons, such as the participants of the case or those attending the proceedings. Public scrutiny implies full access to judgments, and the "findings, evidence, and legal reasoning" are not generally part of the public pronouncement and when the public was excluded from the trial or a part of it." [122]

The international standards of the principle of public judgment mean that under any circumstances the convict and the other parties in the proceeding have the right to access a copy of the decision. It is not enough to read the decision in court. The right to obtain substantially reasoned decision of the court is an integral part of the right to a fair trial. This right applies to all stages of criminal proceedings, including proceedings in the appellate and supervisory instances. Right to a reasoned judgment means that the court should include findings, evidence and legal reasoning of this case on which the court based its decision.

Right to a public court decision means that the defendant and the other parties in the process have the right to know the decision passed by the court. This is the key right to ensure the defendant's right to a defence, and for taking further steps to appeal, such as the stage of the cassation.

Courts of the Republic of Belarus pass the sentence in the name of the Republic of Belarus (Article 349, CPC). The verdict shall be lawful, reasonable, reasoned and fair. Sentence is recognized as lawful, if it is passed in accordance with all the requirements of the law and on the basis of the law, the sentence is recognized as reasonable, if it was passed only on the grounds of the evidence submitted to the court which had been comprehensively, fully and objectively investigated in court proceeding; the sentence is recognized as motivated, if there are the proofs on which the conclusions of the court and the reasons for its decisions are based, the sentence is recognized as fair if the defendant is imposed punishment or other penal action in accordance with the degree of social danger of the committed crime and his personality, and the innocent was acquitted and rehabilitated (Article 350 of the CC).

It is also important that the sentence of conviction cannot be based on assumptions and it is passed only on condition that during the trial the guilt of the defendant of committing the crime was confirmed by the court on the totality of evidence.

According to Art. 365 of the CPC, after signing the sentence the court returns to the courtroom and the presiding official announces the sentence. All present in the courtroom, not excluding the court, listen to the sentence standing upright. After the announcement of the sentence the chairperson explains to the defendant and other parties the content of the judgment, the order and terms of its cassation. If the defendant is sentenced to the capital punishment — the death penalty, he is also explained the right to grant for a pardon.

Sentences, rulings and decisions of the courts in all cases are read out publicly. The copy of the sentence shall be given to the convict or the acquitted within five days after its announcement, but in case of a substantial volume of sentence — not later than within ten days. Other parties may get a copy of the judgment or an extract from upon their request, within the same time periods (Article 367, CPC).

The participants of the proceeding, in accordance with established order, may appeal or protest the sentence passed by the court of first instance on cassation and may request an oversight review of the judgments. However, they can submit the additional materials in support of their arguments.

The analysis of Belarusian law on the observance of the right to a public and reasonable court judgement affirms its compliance with international legal standards, but in the

122 UN HRC, General Comment 32. Para.29. http://www2.ohchr.org/english/bodies/hrc/comments.htm

judicial practice, cases of its violation are rather often. Thus, according to the criminal cases initiated on the events of 19 December, the facts on which the conviction sentences were passed, in most cases did not comply with the proofs presented by the investigation. The court has not been submitted with credible evidence that the defendant had committed themselves at least one of the activities that the disposition of Article 293 of the Criminal Code referred to as mass riots. The court proceedings on this case had predetermined character and accusatory bias. The nature of the preliminary investigation and the trials on these criminal cases clearly indicates their political character.

3.4.12. The Right to Appeal

One of the integral parts of the right to access to justice is the opportunity enshrined in paragraph 2 of Article 14 of the International Covenant on Civil and Political Rights for anyone convicted of a crime so that his conviction and sentence being reviewed by a higher judicial instance according to law . The same was also said in Art. 2 of Protocol 7 to the Convention, adopted in 1984.

The right to the review of court decision or punishment cannot be guaranteed only by the existence of a superior court or a tribunal. The superior court shall have jurisdiction to review the case *ad rem*. In other words, moreover, that the court should be independent and impartial, it must also have the appropriate jurisdiction.

The right to appeal may be exercised if the person against whom the judgment was passed, within a reasonable period of time has access to a properly reasoned written judgment at all stages of review or appeal the judgment. The person must also have access to all other documents necessary for the exercise of this right, as, for example, the protocols of court sessions.[123]

Elements and rights relating to a fair trial, should also be observed in the higher courts during the judicial review. They include:

- the presumption of innocence;
- the right to adequate time and facilities for the preparation of the complaint;
- the right to a lawyer of their choice;
- the right to equality of arms (including a right to know about the documents presented by the opposing party);
- the right to be tried within a reasonable period of time;
- the right to a public and well-grounded judgment passed within a reasonable period of time.

The right to a public hearing is not necessarily applied to all the procedures for appealing the sentence or punishment.[124] But where national legislation provides for the defendant's personal participation in the appellate proceedings and the associated public hearing, the relevant international standards shall be applied.

Article 115 of the Constitution contains the rule that the parties and persons involved in the process, have the right to appeal judgements, sentences and other judicial decisions. The cassation order of review of sentences and judgments which have not come into force is in action in the Republic of Belarus (Section X of the CPC). The sentences of all courts of first instance are subject to appeal or protest, except the Supreme Court of the Republic of Belarus sentences which come into force since they are pronounced (Part 6 of Article 370, Part 2 of Article 399, CPC).

Part 6 of Article 370 of the CPC contains an exemption from the constitutional principle: the sentences of the Supreme Court are not subject to appeal or reverse by way of cassation. The

123 UN HRC, General Comment 32. Para.49. http://www2.ohchr.org/english/bodies/hrc/comments.htm

124 UN HRC, General Comment 32. Para.28, 29. http://www2.ohchr.org/english/bodies/hrc/comments.htm

opportunity to appeal such a decision, may take place only through review proceedings.

Belarusian legislation enshrines that prosecutor, defense counsel, victim, civil plaintiff, civil defendant; the representatives may participate in a trial hearing a criminal case on appeal (Part 1 of Art. 382 CPC). The court hearing a criminal case on appeal also takes a decision whether the defendant held in custody may participate in the trial.

The defendant appearing before the court anyway is allowed to give explanations (Part 2 of Art. 382 CPC). The mandatory participation of the defendant and his defense counsel in a criminal case in the court of appeal is provided by law only in cases where the defendant was sentenced to death penalty (Part 3of Article 382, CPC).

It appears that part 2 of article 382 Criminal Procedure Code, under which the participation of the defendant in the court hearing the case on appeal is allowed by the court, does not meet the provisions of Art. 6 (1) of the Convention.

This above-mentioned provision allows the court of appeal, in case it rejects the request of the defendant held in custody to participate in the trial, to take the final decision on the case without providing such a person with an opportunity to state his position on the issues before the Court personally at the hearing.

A convict is in an even more unfavorable position when his case is considered by the supervisory authority.

If the case is considered in the appellate trial, a defendant and other participants of the criminal process may have the right to become acquainted with the complaints and protests submitted to the court and to object them (Part 2 of Art. 373 of the CPC), whereas if the case is considered in the supervisory trial, all the interested persons can become acquainted with the protest only if they are invited to a court hearing (Part 3 of Article 411, CPC).

Meanwhile if a criminal case is considered in the exercise of supervisory powers, the participation of the appropriate prosecutor is mandatory (Part 2 of Art. 411 CPC).

It should be borne in mind that both appeal and oversight judicial instances are entitled to take a decision aimed at aggravating the defendant's situation if the case is reviewed not by his complaint but by the complaint of the victim or the protests of authorized officials raising the question of the reversal of the sentence or turning it to the unfavorable side for the convict (Part 2 of Article 386, Part 3 of Article 414, CPC).

The aforesaid gives grounds for concluding that, contrary to the appellate proceedings, the oversight procedures for the review of court decisions cannot be regarded as an appropriate effective remedy of judicial defence, which should be provided to everyone whose rights and freedoms are violated, as it is inconsistent with the principles of fair and adversarial justice.

IV. FINAL CONCLUSIONS AND RECOMMENDATIONS

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4.1. Conclusions

Based on the analysis of the events related to 19 December 2010 and the retrospective outlook of the country's social and political life, it can be concluded that the practice of human rights violations and suppression of civil society's activity in Belarus is a regular phenomenon closely linked to the electoral cycle. The criminal cases initiated against politicians, pro-democratic activists and participants of the peaceful protest action on 19 December may not be considered within the scope of criminal law and criminal process only. A different approach is dictated by the distinctive political underpinning of the criminal prosecution, as is proved by numerous procedural violations as well as convictions in all the cases under study despite controversy of evidence and failure to prove the very fact of mass disorders themselves.

Those international organizations whose mandates include the promotion and protection of human rights have been negatively assessing the respective situation in Belarus for a long period of time already. The UN, OSCE, Council of Europe and European Union, joined by a number of individual countries, have repeatedly expressed their concern that Belarus disregards its international legal commitments in the field of civil and political rights. At the same time, the government of Belarus is demonstratively reluctant to cooperate with international organizations in this sphere.

The year 2010 started with the local elections and ended with the election of the President of Belarus. This time period is marked by multiple violations of civil and political rights. The peaceful protest action against falsified voting results that took place in the evening of 19 December was harshly dispersed by special-purpose police forces. Over 600 people were detained and arrested for 3 to 15 days under administrative cases. Several dozens of the participants (including 6 of 9 rivals to the incumbent president) were prosecuted criminally.

Context of the Criminal Trials

As of today, there are two strictly antipodal points of view on what happened in the evening of 19 December 2010. The authorities' official version, as it reads in the court sentences, insists that those were mass disorders and actions gravely violating public order, and they were suppressed by the police in accordance with the law. The second version is an unofficial one and is supported by human rights defenders, international experts, NGOs, opposition politicians and international organizations. According to it, a peaceful rally took place on that evening, while an insignificant number of those present committed violent actions against the property of the House of Government. This version also points out that the police used disproportionate force against all participants in spite of the fact that the overwhelming majority of those present at the rally did not support, or took part in, any acts of aggression. Moreover, all experts agree that actions by particular individuals may not have been taken to justify mass use of violence by the police against all the protestors. The criminal prosecution that followed against the organizers and participants of the peaceful rally failed to personify the liability of the individuals for the actions they committed.

When analyzing the essence and methods of the media coverage related to the criminal prosecution of those detained during and after the events in the evening of the 19 December 2010, one can arrive at the following conclusions. The reports and comments regarding those detained, suspected or charged were made by both professional journalists and officials (of criminal prosecution authorities and executive bodies). In its essence, the information about the criminal prosecution disseminated by the state-run mass media was either based on materials received from pre-trial investigators and intelligence agen-

cies or obtained in their own right. Its character was distinctively criminative. Coupled with statements made by various officials including the President, it generated a negative informational background intended to create public confidence in the guilt of the accused well in advance of any hearings in court.

The scale of the criminal process against presidential candidates, their proxies and other persons detained in connection with the public events that took place in the evening of 19 December 2010 in Minsk is, for the time being, the largest in terms of both the number of convicts and the number of presidential candidates among them. Nevertheless, as the history of political life in the country shows, criminal prosecution against participants of opposition-oriented political events is not in the least new.

The public oversight in the context of these criminal procedures played a significant role in figuring out actual circumstances behind the criminal cases. It can be acknowledged that this issue gained close attention right in the first days after the events when it became known about the prosecution of the protest action organizers and participants. Despite the lack of transparency in the Belarusian system of justice and no public access to texts of the sentences, the civil society managed to obtain sufficient information about the course of the court proceedings. It largely happened due to the presence of the mass media, OSCE/ODIHR observers and foreign diplomats. The establishment and activity of the International Observation Mission of the Committee on the International Control over the Human Rights Situation in Belarus became an effective example of the consolidation of the human rights movement both in Belarus and the OSCE member countries.

The total of 14 criminal cases directly connected with the presidential elections and the related peaceful protest action took place between 17 February and 12 October 2011 in Minsk. All court proceedings ended with guilty verdicts. 5 of 10 presidential candidates were convicted. The overall number of the convicts was 44. Three of them, presidential candidates Andrey Sannikov, Nikolay Statkevich and Dmitriy Uss, were sentenced to 5 to 6 years in prison for "the arrangement of mass disorders" (Article 293, Criminal Code of the Republic of Belarus). 10 participants of the protest action, including presidential candidates Vladimir Nekliaev and Vitaly Rymashevskiy, were convicted of "the arrangement of actions gravely violating public order" (Article 342, Criminal Code of the Republic of Belarus). Leaders of the youth organization Young Front (the Czech Republic), Dmitriy Dashkevich and Eduard Lobov, were convicted under Article 339 of the Criminal Code (hooliganism). 28 protest action participants were sentenced for taking part in mass disorders to various types of punishment (2 fined, 3 sentenced to 3-year restriction of liberty, and 24 incarcerated for 3 to 5 years).

The relation of 13 criminal trials to the 19 December protest action is explicit as the defendants either took part in it or acted as its organizers and the charges of violating Articles 293 and 342 of the Criminal Code were directly linked to the said events. As for the case of Dmitriy Dashkevich and Eduard Lobov who were accused of hooliganism (Article 339, Criminal Code) allegedly committed prior to the presidential elections, this relation is implicit and needs further explanation. The both defendants were leaders of the Young Front, a Belarusian youth organization registered in the Czech Republic. Members of this organization, including Dashkevich and Lobov themselves, had been actively involved in the preparation of the post-election protest action, which is proved by the facts pronounced in court.

Court's Interpretation of the Actions by the Protest Organizers and Participants

The court admitted the occurrence of mass disorders at Independence Square. At the same time, any actions by those accused of grave violation of public order (Article 342 of the Criminal Code) were considered in relation to the events in October Square and the march to Independence Square only. For this reason, it is impossible to specify how actions

by these persons differ from actions by those convicted under the article on mass disorders (Article 293 of the Criminal Code).

The court's position as to the time frame and content of the public order violation is as follows: *"… on 19 December 2010, in the time period between 20 hours and 20 hours, 58 minutes at October Square in Minsk, there was held an unsanctioned rally; in the period between 20 hours, 58 minutes and 21 hours, 50 minutes, there was an unsanctioned march along the carriageway of Independence Avenue; and from 21 hours, 50 minutes until 22 hours, 13 minutes, there was an unsanctioned rally near the House of Government at Independence Square; i.e. actions accompanied by grave violation of public order and associated with explicit refusal to abide by lawful orders of authorities, shouting, whistling, chanting various slogans as well as the disruption of the work of public transport and normal function of businesses, institutions and organizations."* [1]

At the same time, when hearing the cases under Article 293, the court considers the actions by the persons identified as mass disorders organizers — starting from calls to come to October Square and ending with the events at the entrance of the House of Government — as the preparation, arrangement and control of mass disorders.

When describing the concept of mass disorders, the court uses the definition from Article 293 of the Criminal Code. This article specifies liability for the arrangement of mass disorders *"accompanied by violence against person, destructions, arsons, damages of property, armed resistance to authorities"* as well as for the participation in mass disorders in the form of direct commission of the said acts.

Here, of most interest is to view this definition against the actual events at Independence Square and actual actions by the defendants in the criminal cases under study. In all the sentences, the court arrived at the conclusion that the arguments by the prosecution with regard to armed resistance to the police as well as arson preparations were ungrounded as they were not proved by the evidence collected.

The most complete aggregate description of the events at the Square as *"mass disorders"* is given by Minsk City Court in its appellate rulings: *"The court arrived at the correct judgment that those were mass disorders which took place on 19 December 2010 at Independence Square in Minsk. That is, actions by a disorderly crowd with the aim to intrude into the House of Government that were accompanied by violence against person and destructions which took form of blows by hands, feet, blunt solid objects, fishing rods and metal truncheons on various body parts of the police staff members and on the shields they were holding in their arms, throwing bottles, wooden sticks, metal rods, pieces of ice, fragments of fishing rods in their direction, spraying the content of a powder fire distinguisher in the direction of the police staff members, grabbing on their garments, pulling protection helmets off their heads and pushing, whereby causing physical pain and injuries to the police staff members and the destruction of property: decorative greenery, door and window glazing, door frames and panels, window frames and rainwater drainpipes."* [2]

Damages as a Result of the Protest Action
(Harm to Property and to the Aggrieved Policemen)

Based on the court's position in these cases, it may be concluded that the court did not task itself to make an accurate identification of the damages caused by the defendants' actions. For instance, the court failed to associate with particular persons the following episodes in the list of damaged and destroyed property: the destruction of 5 Juniperus sabina shrubs and the destruction of a rainwater drainpipe. While some of the accused were

1 *Sentence by the Court of Frunzenskiy District (Minsk) dated 20 May 2011 in the case against Nekliaev, Rymashevsky, Dmitriev, Feduta, Vozniak and Polazhenko.*

2 *Appellate ruling by Minsk City Court in the case against Kirkevich, Vinogradov, Drozd, Protasenya and Homichenko.*

imputed with specific actions, such as damaging the glazing, the court mostly limited itself to pointing out that a defendant acted within a group where "other persons" were breaking glass. The typical wording used to describe participation in damaging and destroying property reads as follows: *"… [he] committed forceful actions aimed at the intrusion into the House of Government…, namely, by physical force and specially designed objects used by other participants, and destroyed the glazing of entrance doors and windows…"* [3] Both the pre-trial investigation phase and the court hearings failed to identify any person whose direct actions caused harm to the aggrieved persons. The total amount of the material damages was estimated as 14,048,000 Belarusian roubles (approx. EUR 3,517). After the first court trial, this amount was gathered by the public and remitted to the owner of the House of Government (Main Economic Department of the Presidential Affairs Office) so that the lawsuit against the defendants could be withdrawn.

There were no aggrieved persons claimed in the first trial (the Parfenkov case, started on 17 February 2011). Later on, on 3 March 2011, in the trial of the Medved case heard simultaneously with the case against Breus and Gaponov, 15 policemen of the Main Department of the Interior (Minsk City Executive Committee) who took part in the crackdown on the rally were alleged by the prosecution as aggrieved persons. Another 14 aggrieved policemen were alleged in the trial of the case against Nikita Lihovid. So, the total number of the aggrieved persons in this process and subsequent ones reached 29. It should be noted that no other aggrieved persons besides the said policemen appeared in the cases — neither protestors nor accidental passers-by.

Based on the aggrieved persons' testimonies and medical examination results, the court arrived at the following conclusions regarding the policemen's injuries:

a) all persons claimed by the prosecution as aggrieved were acknowledged as such;

b) 2 of the aggrieved persons received minor injuries that caused short-term impairment of health[4] (Bulovatskiy: upper lip wound, Skorohod: nape and vertex wounds);

c) 3 of the aggrieved persons received minor injuries that did not cause short-term impairment of health[5] (Kashtalanov: left hip haematoma; Lushchik: bruise, intramuscular left buttock haematoma; Kudravets: multiple head, chin and left hand bruises and abrasions, and left hip soft tissue bruise);

d) whereas injuries alleged by 24 aggrieved persons failed to be proved by medical examination, the court does not refer them to any particular degree of severity. In the court's opinion, those aggrieved persons were subjected to battery[6] and physical pain.[7]

None of the aggrieved persons managed to identify from among the defendants who particularly committed unlawful actions against him.

Position of the Court Regarding the Distinction between Organizers and Participants

The court arrived at the conclusion that the concept of mass disorders included the following actions:

3 Sentence by the Court of Partizanskiy District (Minsk) dated 29 March 2011 in the Lihovid case.

4 "An impairment of health directly connected with the damage is deemed to be short-term where it lasts over six days but does not exceed 3 weeks (21 days)" (paragraph 19 of the Rules for Forensic Medical Examination of the Nature and Severity of Injuries in the Republic of Belarus as approved by Order No. 38-c dated 1 July 1999 "Normative Legal Acts and Methodological Documents of the Belarusian State Forensic Medical Examination Service" adopted by the Belarusian State Forensic Medical Examination Service. Text as of 8 November 2011).

5 "A minor injury causing no short-term impairment of health or insignificant persistent loss of capacity to work refers to a damage that has insignificant and rapidly reversing consequences which does not exceed six days" (paragraph 21 of the Rules).

6 "Battery does not constitute a special type of damages as it does not leave any objective traces. <…> A state forensic medical expert shall not qualify damages as tormenting or torturing; the decision over this matter is in the competence of bodies in charge of interrogation, pre-trial investigation, prosecution and trial" (paragraphs 22 and 23 of the Rules).

7 There is no concept of "physical pain" in the documents governing the conduct of a forensic medical examination.

a) public calls to come to October Square on 19 December 2010;
b) distribution of allegations claiming an undemocratic conduct of the elections and falsifications of the elections by the Central Election Commission;
c) planning and preparation of provocations to increase aggressiveness of the crowd, in particular the communication of false information about the illegitimacy of the existing power to the rally participants and distribution of exit-poll data;
d) initiation and guidance of the march from October Square to Independence Square ("*[he] headed the disorderly crowd comprising several thousands of people united into a single destructive force…, being part of it, moved along the carriageway of Independence Avenue up to the House of Government*");
e) manipulation of the crowd in order to penetrate into the House of Government ("*keeping in mind the psychology of the crowd and guiding its spontaneous actions in a desirable direction,*" and "*inspiring the feeling of revenge and other sinister intentions*");
f) approach to the entrance of the House of Government, whereby demonstrating the impunity of actions and "*inciting most active participants to use violence against person and damage and destroy property*"; and
g) direct control of the actions by the participants of mass disorders.

The participation in mass disorders was supposed to include the following actions (individual or aggregate):
a) action within a group as criminally conspired with other participants;
b) blows on entanglements in the House of Government;
c) damage to the door and window glazing at the entrance into the House of Government;
d) destruction of the rainwater drainpipe on the House of Government (this action failed to be associated with any particular persons);
e) destruction of juniper shrubs at the entrance to the House of Government (this action also failed to be associated with any particular persons);
f) active resistance to the police, blows on their shields and protective gear;
g) attempted penetration into the House of Government;
h) delivery of bottles with a flammable substance and injury-intended objects to the House of Government (this action also failed to be associated with any particular persons);
i) causing injuries, physical pain and battery to the aggrieved policemen (these actions also failed to be associated with any particular persons);
j) stay within a group of people committing acts of violence regardless of a realistic possibility to leave Independence Square. [8]

Right to be Heard by a Competent, Independent and Impartial Tribunal Established by Law

The professional monitoring over the court proceedings revealed numerous violations of the right to a fair trial guaranteed by the Constitution and the international human rights instruments binding upon the Republic of Belarus.

The right to a fair court hearing is a generally accepted international legal norm directly related to human rights. The right to be tried for committing a crime by an independent, impartial and competent court that observes all procedural and legal guarantees is the right which is generally accepted and protected worldwide.

Independence of the judiciary must be guaranteed by the country's constitution, laws and policies and must be practiced by the executive branch of power and its bodies and representatives as well as by the legislature.

The judiciary must be independent in terms of the internal structure of the judicial administration including the distribution of cases among judges within the court they belong to.

8 As for the case against Doronin, Kazakov, Loban, Matsukevich, Sekret and Fedorkevich, the appellate court concluded that "their direct participation in them [i.e. in mass disorders] while there was a realistic possibility to leave Independence Square when the mass disorders began, proves their intent to take part in the mass disorders." Other sentences in the cases of participation in the "mass disorders" contain the same wording.

Although the Constitution and other acts of law devoted to the criminal justice system guarantee the independence of judges, the executive power, represented by the Presidential Administration and Ministry of Justice, has significant leverages to control various spheres of the judiciary. The existing legal regulations covering the appointment procedures, tenure, promotions and dismissals of judges and their remuneration do not generally meet the standards which would guarantee independence of the court required to ensure the right of an individual to have his/her case tried by an independent court. This issue has been repeatedly raised in reports by international institutions.

During the selection process, candidates for a judge position are put on the so-called "reserve list." Such listed candidates are thoroughly examined by the head of the respective regional department of justice (a body of the executive) together with the chairman of the court which has a vacant position. Any competition of applications does not exist, and none of the candidates may be nominated as such without prior consent from the executive. This procedure gives room to a certain degree of arbitrariness and intervention in the selection process by the executive and, thus, falls short of international standards. Candidates for judicial positions are proposed by the Minister of Justice jointly with the Chairman of the Supreme Court. Judges are appointed by the President of Belarus who has powers and discretion to approve or reject any proposed candidature without explanation.

The fact that the both authorities in charge of proposing a candidate are themselves appointed by the President combined with the fact that the final approval of the candidate is made by the President as well means that the President has the total control over all aspects of the appointment of judges. This role of the President is incompatible with the concept of independent court.

According to the Code of Judicial Administration and the Status of Judges, a judge is initially appointed for a fixed 5-year term followed by an audit of his/her work when it expires. After that, the judge may be either reappointed for another five years or granted life tenure (subject to mandatory retirement at the age specified for this particular civil servant category). The Code of Judicial Administration and the Status of Judges does not provide any criteria justifying the appointment of a judge for life instead of a fixed-term (i.e. temporary) appointment.

Remuneration of judges, including their salaries, bonuses and benefits, is regulated by the Presidential Administration. This financial control of the remuneration encourages dependence of the judges on the Presidential Administration. Other benefits, including the right to improve housing conditions and receive subsidized real estate loans, also submit judges to the will of the executive. As these benefits are distributed by local bodies of the executive branch, there is a clear possibility to exert unlawful pressure on judges.

In practice, judges do not value the principle of independence and their own role in its implementation and demonstrate not only indifference to it or lack of understanding but also their dependence on the opinions expressed by bodies of the executive.

When hearing the cases of the charges related to the participation in the 19 December events, Belarusian courts showed that their decisions depended on opinions of top-rank state officials and ruled in favour of conviction in all the cases. Moreover, three political opponents of the incumbent — presidential candidates — received lengthy sentences of incarceration.

In most of the trials, the court demonstrated bias and prejudice towards the accused and was not perceived as impartial by those present in the courtroom. For instance, the court afforded making critical remarks that evidenced its explicit lack of confidence in testimonies by the defendants or witnesses for the defence; the court always declined reasonable motions by the defence etc.

The fact that officials from the Ministry of the Interior and KGB were present in the courtroom might also make its impact on the judges, the lawyers and on the examination of the cases as a whole. The way many of the judges behaved may be interpreted as a reflection of a prosecutorial bias.

It should be noted that the courts widely practiced some unusual security measures. All visitors were subjected to frisking including personal belongings. What was different from similar practices in other countries is that personal identity documents were to be produced upon entry and visitors' names were put on record. In all the courts, the records were made by plainclothes people wearing no identification whatsoever. At some court hearings a video record of each visitor entering the courtroom was made at the time when the visitor was undergoing the second frisk. Notably, only those who came to attend hearings of the cases related to the 19 December events were put on video record; no attention was paid to visitors of other court hearings going on in parallel in other courtrooms.

The accused has the right to be heard by an impartial court. Tribunals, courts and judges must be impartial. The requirement of impartiality has two aspects. Firstly, judges must not allow their decisions to be influenced by personal interest in the case outcome or by prejudice, must refrain from being biased with regard to any particular case they hear and must not act in a way unreasonably supporting one party's interests to the detriment of the other. Secondly, the court must also be perceived as impartial by a reasonable observer.

In all the trials, the judges accepted the total of 117 motions and objections against the defence. 14 decisions were taken against the prosecution. Only two motions from the prosecution requesting to enter a proof into the case file were declined in all the trials. All objections by the defence against proofs submitted by the prosecution (e.g. against entering records of wiretapped telephone conversations or video records into the file) were declined.

The courts gave grounds for less than a half of their decisions on a motion or proposal. Even when the judges withdrew to the consultation room to think over an important motion, when back, they just pronounced the result, not the grounds for the decision taken.

Another form of the court's prosecutorial bias was revealed in the process of making decisions as to whether a particular proof related or did not relate to the case. The prosecution was allowed entering a plentiful of proofs into the case file, although those proofs should have been evaluated as having no relation to the case.

The manner of communication with those present in the courtroom also reflects the court's partiality and bias in favour of the prosecution. Quite often the judges asked additional questions to those witnesses and aggrieved persons which supported a version by the prosecution or disproved a version by the defence.

Noticeably, special attention was paid to proofs in support of a particular position: additional or suggestive questions were put to certain witnesses (more often to those supporting the prosecution's perspective), while other witnesses' testimonies were ignored; even if the court deigned to hear them, it was done perfunctorily, and such witnesses' explanations would often be interrupted and questions to them challenged as not related to the case. Based on that, professional participants in the trial and the public present in the courtroom almost always was able to make a right conclusion as to which of the testimonies would be taken as a basis for the court's judgements.

In the sentences, the courts also demonstrated their unequal attitude towards different evidence by detailing the proofs of guilt while leaving important moments without assessment or paying no attention to the evidence from the defence at all.

For example, as the study of the sentences imposed by the courts on the participants of the events of 19 December 2010 in Minsk shows, the courts made a detailed account of testimonies by the aggrieved persons, the policemen, some of which were not even inter-

rogated in court; but their testimonies "perfectly matched" the charges. At the same time, testimonies by witnesses for the defence who were interrogated in court in detail and within a long period of time are specified in an extremely concise form, with some essential moments being left by the court totally unanalyzed.

On top of that, the assessment of the situation regarding the 19 December 2010 events allows pointing out that the authorities demonstrated unequal attitude towards various participants of the unsanctioned rally. According to varying estimates by human rights defenders, the total of 10 to 30 thousand people took part in the meeting in October Square, the march along Independence Avenue to Independence Square and the rally in Independence Square. However, only 53 persons, 34 of which are presidential candidates, public and political activists and participants in the opposition candidates' election activities, were criminally charged of participation in (or arrangement of) mass disorders or participation in (or arrangement of) group actions gravely violating public order. During the election campaign, the above-mentioned persons strongly criticized the existing power and the incumbent head of state. Their active stance regarding many aspects of the country's social and political life probably became the actual reason for their criminal prosecution and subsequent conviction.

Regretfully, we have to admit that the court's performance in a criminal trial acquired a clear prosecutorial bias long ago, for the court more frequently uses its rights specified in the Code of Criminal Procedures to fill gaps of the prosecution, not the defence, so that the conclusions made by the prosecution find their confirmation in court. This was most vividly demonstrated in the court hearings related to the 19 December events. All the 14 trials resulted in convictions regardless of the defendants' refusal to confess and the lack of an aggregate of reliable and acceptable evidence including the lack of any evidence to prove that any mass disorders did take place.

Independence of Advocacy and the Right to Defence

According to international standards in the field of independence of advocacy, everyone charged with committing a crime has the right to the assistance and defence by a lawyer. The state must guarantee independence of the legal profession and ensure necessary conditions for lawyers to discharge their professional functions.

The recent reform of the institute of advocacy in Belarus has failed to address the existing problem and only added to its aggravation. Article 1 of the new Law on Advocacy and the Advocacy Activity in the Republic of Belarus adopted in 2011 no longer contains provisions indicating that the advocacy is an independent legal institute. This fully reflects the actual position of the advocacy in Belarus.

In practice, the problem of intervention in the activity of the advocacy in general and individual lawyers in particular especially aggravated after the 19 December 2010.

It should be noted that in January-February 2011 lawyers received official warnings from the Ministry of Justice for their statements which, in fact, were true and objectively reflected the gravest violations of their clients' rights. Moreover, the lawyers' statements appeared in the mass media only after the relevant complaints were lodged with the prosecuting authorities and the state failed to respond to them in any adequate way. That unlawful intervention in the lawyers' activity has had an impact on other lawyers as well, who, fearing the loss of licence, refrain from any public expression of reasonable negative assessments of actions by state agencies and officials. This, no doubt, decreases the efficiency of the defence and does not serve to the objectives pursued by the system of justice.

Later, as initiated by the Ministry of Justice, a number of lawyers were deprived of their advocacy licences. All lawyers who lost their licences acted as defenders in the criminal

trials related to the events of 19 December 2010. It should be noted that the violations "exposed" by the Ministry in the course of auditing those lawyers' internal records were technical, i.e. connected with document management, and in no case had any relation to the discharge of direct professional duties, i.e. defending rights and legal interests of individuals, and did not compromise the quality of legal assistance provided. The reasons behind the decision to withdraw the right to advocacy from those lawyers were perfunctory. The licences were terminated in violation of the legally established procedure; no account was taken of the lawyers' professional qualities and exclusively positive track records as well as absence of any implications resulting from the "detected cases of misconduct." The procedure of withdrawing advocacy licences, as applied by the Ministry of Justice, aimed to intimidate the entire advocacy community so that lawyers would fear to take on any case at all. It should be stressed that the target was reached.

Observers had an opportunity to evaluate the total performance by the defence. As assessed by the Monitoring Team, the quality of lawyers' work varied substantially. Some lawyers refrained from disproving easily disprovable evidence, from making motions that could improve their client's position and from serious cross-examination of witnesses for the prosecution — more so if they were policemen or other representatives of the authorities. The defence (e.g. Sannikov's lawyers) played an active role in the collection of additional proofs and search for witnesses only in a few trails.

The fact that a number of practicing lawyers had been deprived of their advocacy licences for alleged misconducts related to the cases in question could most probably make a deterring influence on other lawyers. As it was evident to the observers, some lawyers seemed to feel that, should they start defending their clients too zealously, they would have problems in their professional sphere.

Role of the Public Prosecutor

For the prosecutor to properly discharge his/her functions, full autonomy and independence from other branches of state power are required. In contrast to the provisions concerning judges, international law does not specify any norms that would guarantee institutional independence of prosecutors, and some systems provide that prosecutors are appointed by the executive branch and bound to a certain degree of accountability to it. This means that they are obliged to abide by orders from state authorities. An independent public prosecution body is more preferable as compared to a body that is accountable to the executive power; in either case, however, the state must provide for guarantees enabling prosecutors to carry out investigations in an impartial and objective manner.

The prosecutor's offices demonstrated their dependence on the bodies of the executive when they sanctioned detention in custody as a measure of pre-trial restraint for all the persons proposed to be arrested by the body of criminal prosecution. The only reason in support of the restraint measure was the severity of the crimes allegedly committed, as was publicly announced by top-rank state officials well before the trials.

There was another notable form of such dependence: during the debates in most of the court trials, public prosecutors tended to support the charges in their entirety. As the analysis of the sentences shows, those were namely the courts which, in a number of cases, excluded the qualifying elements which had not been proved in court from the sentences.

As noted above, the existing Belarusian laws oblige the prosecution to present both inculpatory and exculpatory evidence. However, this duty of the prosecution failed to be duly discharged in a number of the trials.

Due to different legal status of the prosecution as compared to that of the defence, the public prosecutor, not the judge, happened to act as an arbitrator who regulated the defence's access to experts, searches and compelled testimonies. The prosecution had a duty

to provide the defence with all available evidence of innocence, not limiting to those proofs which were entered into the case file, with due indication of particular exceptions (such as matters of state security, witness protection etc.).

Moreover, as required by international standards and national law, public prosecutors must not use any evidence against the suspect if they know or reasonably assume that such evidence is obtained by unlawful means.

The public prosecutors in the court trials related to the 19 December events demonstrated full disrespect to the said requirements of the law and, in supporting the charges, referred to such inadmissible evidence as records of wiretapped telephone conversations, video records, pre-trial testimonies by the accused obtained under psychological and physical pressure.

Role of the Aggrieved Persons (Victims)

States should take appropriate measures to ensure safety, physical and psychological well-being and privacy of the aggrieved persons and their families. At the same time, such measures should not be detrimental to the right of the accused to a fair and impartial court hearing and should not be incompatible with this right.

The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to confrontation in the context of a criminal trial. In contrast, the Belarusian laws do not insist on the right to confrontation and, in fact, allow entering written testimonies into the case file as proofs in the situations when the defence was unable to interrogate the person so testified. This comes into contradiction with international standards.

In the course of court hearings of the cases initiated in connection with the 19 December events, 29 policemen who were on duty that night acted in the capacity of aggrieved persons and testified about crimes allegedly committed against them. Some of them testified in all 8 criminal trials where aggrieved persons were claimed as part of the case. In all the trials, none of the aggrieved policemen were able to identify any of the accused as the person who caused them the alleged injuries. All the aggrieved persons behaved passively and refrained from claiming any moral or material damage. None of the 29 policemen brought a lawsuit in court. Their status as aggrieved persons, their testimonies (especially when many of them did not appear in court, though summoned) and some aspects regarding the protection of their rights gave rise to much controversy. There were no aggrieved persons in some trials, but that did not prevent the courts from imposing sentences of conviction.

There was a serious problem in the above-mentioned court hearings arising out of the fact that the aggrieved persons who were to testify later had been allowed to stay in the courtroom from the very beginning and on. Keeping witnesses outside the courtroom serves to the lawful purpose to prevent them from hearing testimonies by other persons and changing their own ones under the influence of what was heard. Based on their scope and character of participation, the role of the aggrieved persons in the trials under study was limited to giving testimony. Moreover, in some court hearings, the aggrieved persons never appeared in court unless they were to testify — in some hearings, that moment came only in several days after the trial commenced. They left the courtroom immediately after their testimony was over. At the same time, nobody cared to remind the aggrieved persons that, by leaving the courtroom, they waive some important rights. The court did not mind it as well. The fact that the aggrieved persons were brought to court right on the day they were to testify and were allowed to leave at once either speaks in favour of serious disrespect of their rights as victims or totally undermines their status as aggrieved persons.

Additionally, special attention should be paid to the possibility, provided by law, to read out the testimony of a witness or victim if he/she falls under the protection measure

of relieving him/her from appearing in court. It should be noted that, as a rule, the safety measure of nondisclosure of his/her personal data is simultaneously applied to the person so protected. Hear we speak about the use of a testimony by anonymous victims (witnesses) when hearing a case in court. It makes completely impossible for the defence to interrogate such victim/witness and, where the nondisclosure of personal data is applied, to make an adequate assessment of such testimony, which, in turn, is a violation of the guarantee for the accused to examine the witnesses against him or have them examined (in line with the adversarial principle of the trial). The described situation occurred in the criminal trial against Dashkevich and Lobov where, despite controversial testimonies by "anonymous victims," both the defence and the accused were deprived of the opportunity to interrogate those victims in person.

Right to Liberty and Prohibition of Arbitrary Detention

By national law, the severity of the investigated crime a person is charged with is sufficient to hold him/her in custody — without making a personalized assessment of whether the accused is capable to *"destroy proofs, exert pressure on witnesses or evade public justice"*. Moreover, the Belarusian laws still provide the prosecuting authorities with initial discretion of taking into custody. At the same time, the Prosecutor's Office of the Republic of Belarus, even if to view it as an independent institution, is not an appropriate body to decide on taking into custody.

Most of the suspects in the court trials related to the 19 December events were held in custody within the entire pre-trial and trial period. The duration of their custody at the pre-trial phase varied from three to six months, which is in line with international standards concerning the right to trial within a reasonable time. At the same time, there were serious questions as to the grounds behind keeping those persons in custody, their treatment and the availability of access to lawyers.

Right to be Informed of the Detention Reasons and Charges

It is quite frequent in the pre-trial practice when a detained person, being in the state of confusion, is offered — *"as a mere formality"* — to sign the Suspect Interrogation Minutes without prior notification of his rights and without clear explanations of the suspicions and evidence against him. In some cases under study, detainees were deliberately misled by persuasions that there were no charges against them and that they allegedly needed no lawyer because what was happening was allegedly a free conversation to establish *"the truth in this case"*. Later, video records of such "conversations" were used in court and/or unexpectedly broadcast by state-run television channels.

This is a widespread practice when investigators choose not to fulfill their duty of informing a detained person about his/her actual procedural status of a suspect and explaining his/her right not to witness against him or herself as they wish to achieve favourable conditions for the investigation through infringing on the rights of the detained. It should be noted that even the explanation of the above-mentioned rights does not ensure guarantees for the rights of detained and arrested in their entirety. Detainees must be unambiguously notified that they have the right to remain silent and that their refusal to reply may not be used against them or, more so, as evidence of their guilt.

Access to Legal Assistance

Although the Constitution, codes and laws of Belarus provide suspected or accused persons with the guarantee of the right to defence and legal assistance by a lawyer of choice, it appeared to be almost impossible for those detained in custody under the criminal case related to the events of 19 December 2010 to exercise this right. As an example, almost all those in custody were able to meet with their defenders only at the time of indict-

ment or subsequent interrogations in the status of the accused. Also, there was no chance to meet with the lawyer without the investigator's presence (an exception was granted to A. Polazhenko who managed to have a 10-minute confidential talk with her lawyer before the indictment). If the accused refused to testify (for which he/she has the right), then no interrogations were performed, which means that he/she did not see his/her lawyer (e.g. A. Lebedko). Complaints of no access to lawyers after detention were made in court by Nekliaev, Feduta, Sannikov and other defendants. Seeking to elicit a meeting with their clients, the lawyers spent several hours a day in the waiting area of the KGB pre-trial detention center; each time to no effect. The formal reason to deny meetings with clients was alleged lack of free meeting rooms. At the same time, lawyers defending those kept in custody under criminal cases unrelated to 19 December had every chance to regularly meet with their clients and faced no room deficit. During interrogations in lawyer's presence, any attempt by the accused to get his/her defender's advice was immediately repressed. On some occasions, the lawyer was not given a chance to attend the interrogation and only received a copy of the minutes for information. The KGB pre-trial detention center had a widely used practice of placing the lawyer behind the accused [during interrogation] so that the lawyer had no visual or verbal contact with the client as well as no chance for active involvement in the procedural actions. The above-mentioned facts clearly evidence the violation of the right to defence.

Right to Have Adequate Time and Facilities to Prepare for the Defence

As for the cases against participants of the 19 December 2010 events, an example of violations of this right is the rejection of reasonable motions by the defence to provide sufficient time to read the criminal case records and prepare for debates in court. The courts handled the criminal trials related to the 19 December events in a very intensive way and pronounced breaks in the hearings only from the end of the court's working day until the next working day's morning. At the same time, issues that had not been examined at the pre-trial investigation phase were also addressed by the court. Respective information objectively needed additional time to be analyzed; more so if to take into account the severity of the charges and expected liability. In any case, a 10-minute to 1-hour break to prepare for the court debates, as was practiced in most of the trials, cannot be regarded as sufficient time.

There were numerous examples of violations of the above-mentioned right throughout the course of handling the criminal cases initiated on the basis of the 19 December 2010 events, namely:

- failure to provide the accused and his/her lawyer with an opportunity to get familiarized with all records of search and detection activities carried out with regard to the accused;
- unsubstantiated separation of criminal cases under Article 293 of the Criminal Code against particular or several persons into individual proceedings despite the requirements of Article 165 of the Code of Criminal Procedures had a significant impact on the comprehensiveness, completeness and objectiveness of how the cases were examined in court, resulted in the lack of access by the accused and their lawyers to the evidence regarding "other persons" which were of substantial value and, hence, the lack of access to all the evidence proving or disproving the fact of mass disorders;
- the lack of required investigation into facts of torture claimed by some defendants resulted in failure to provide the defence with required information about the way the evidence had been obtained (for instance, some confessions);
- failure to observe the principle of equality of arms as applied to the prosecution and the defence; for instance, the defence was not enabled to interrogate witnesses for the defence in court on the same conditions as the prosecution; reading out tes-

timonies by the aggrieved persons and witnesses and decline of the motions by the accused and their lawyers to interrogate those persons in court.

Right not to be Held Incommunicado

The events of 19 December 2010 showed that most of the detained experienced violations of the right to notify other persons. For instance, V. Nekliaev's family had not for a long time had any information about the presidential candidate's whereabouts after unidentifiable people in plain clothes took him away from the Emergency Aid Hospital. During the first month of detention, relatives of those kept in custody in the KGB pre-trial detention center did not have any information about their health. A number of detained persons were beaten by the police upon detention (Sannikov, Nekliaev and Statkevich), and their state of health was unknown as well.

While in the KGB pre-trial detention center, Statkevich started a hunger strike. Any attempts by his relatives to enquire about his health brought no effect.

In a number of cases, detainees were transferred to other detention centers without notice to their relatives, deliberately giving appearance that they were kept on in the KGB detention center. This, for instance, refers to Mihalevich who was being repeatedly transferred from the KGB detention center to Pre-trial Detention Center No. 1 and back within a week. All that time Mihalevich's family could not locate him.

All those released under pre-trial restraint of their freedom of movement as well as lawyers and relatives of other detainees spoke about isolation aggravated by lack of normal correspondence with close ones. On those rare occasions when relatives managed to receive letters from the detention center, they were delayed for several weeks. Most of the detainees were deprived of access to the press, radio and television and were almost completely isolated from the outside world. Presidential candidate A. Sannikov had been deprived of the right to correspondence with anybody for a month. He was permitted to see his lawyer for the first time on 22 March 2011, i.e. in more than three months after he was arrested. He had been isolated from any outside information for the entire period of his detention.

The above-mentioned examples speak about the gravest violations of international standards in the field of the right not to be held incommunicado (i.e. without access to communication with the outer world).

Right to be Promptly Brought before an Officer Authorized to Exercise Judicial Power *(Habeas Corpus)*

As is known, provisions of the Belarusian Code of Criminal Procedures do not contain requirements of bringing a detained person under immediate judicial oversight. Any matters related to detention and use or extension of custody are decided upon by respective officials and prosecutors. This undoubtedly is a violation of Article 9, paragraph 3 of the International Covenant on Civil and Political Rights. The list of officials who are authorized to decide on detentions and holding in custody has been recently extended in Belarus. This move only worsened the position of detainees as to the provision of their right to liberty and security of person.

The Code of Criminal Procedures of the Republic of Belarus (Article 143, paragraph 1) provides for the right to judicial appeal of detention, holding in custody and its extension. The defender of the person kept in custody or this person, on its own, is entitled to appeal the writ of custody. A complaint claiming unlawful detention in custody is to be considered in a close court hearing. The defender, the victim and legal representatives of the accused have the right to take part in such court hearing, but the accused him or herself.

Thus, it may be concluded that the Belarusian laws in the field of pre-trial detention in custody do not comply with international standards.

As shown by the analysis of the law-applying practice in Belarus, the arrest appealing procedure is inefficient and violates the right to liberty and prohibition of arbitrary arrest or detention.

In practice, the court, when taking a decision, neither checks nor takes into account reasonability of detention. As for the criminal cases related to the events of 19 December 2010, there were occasions when the court was not provided with any evidence which would serve as a basis to conclude on the person of the accused and on other factors which would justify or disprove the application of detention in custody. Any motions by the defence requesting to oblige the investigation body to provide such data were declined. However, regardless of the lack of such information, the court perfunctory stated that there were violations of the law as to the application of restrictive measures in the form of detention in custody.

Article 144, paragraph 3 of the Code of Criminal Procedures provides that, where applicable, the judge may summon a detainee kept in custody or home arrest to participation in the consideration of his/her complaint. As practice shows, such persons were never summoned to appear in court even on those occasions when they filed a motion to be delivered to court to give explanations. In some cases, the necessity for the accused to be summoned to court and participate in the hearings of their complaint of the detention in custody was reasoned by the lack of possibility to meet with their lawyers who were not allowed into the KGB pre-trial detention center. For this reason, the lawyers were unable to communicate the arguments of the accused to the court. Therefore, the persons kept in custody were deprived of the opportunity to inform the court about any violations committed upon decision to apply detention in custody as a pre-trial restrictive measure. This notwithstanding, the court denied the right of the accused to participate in such court hearings. The availability of the provision in the Belarusian laws that allows the court to hear such complaints without the complainer's presence makes their consideration totally inefficient and constitutes a violation of internationally accepted guarantees (i.e. the right to be tried in his/her presence and the right to defence).

Humane Treatment, Freedom from Torture and Cruel Treatment

According to Article 7 of the International Covenant on Civil and Political Rights, "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

Based on the information about the cases related to the events of 19 December 2010, the following examples can be drawn demonstrating how the accused were treated when in custody; these forms of treatment may be viewed as the violation of the right to human treatment and freedom from torture during detention in custody:

- lack of individual sleeping places in the cells and the necessity to sleep on the floor, on plank beds, in shifts;
- use psychological and physical influence, use of violence;
- lack of possibility to have a rest;
- compulsory conversations with law enforcement officials without a lawyer for a long period of time (approx. 5 hours);
- lack of access to toilet (were not allowed to toilet);
- while in the cells, the detained were compelled to lie on plank beds with their faces toward the "day" lighting in daytime and towards the bulb lamp on the ceiling in nighttime; if somebody turned away when asleep, the entire cell was waken up to take the "right" pose;
- frisking: detainees were compelled to leave the cell with all personal belongings including the mattress and bedding, then "herded" down a steep staircase into a cold concrete basement;

- detainees were compelled to strip naked, stand with their legs extended in opposite directions as wide as possible ("split") and squat; this was done by at least three specially trained people wearing balaclavas who chanted "beastly yells", basted their batons against the walls and staircases and sometimes allowed themselves to make knocks on detainees' backs and legs;
- detainees were walked along the detention center in handcuffs, often applied behind the back and with arms lifted up ("swallow");
- detainees were compelled to watch internal television which broadcasted films with scenes of explicit violence or of anti-Semitic nature ("Russia Stabbed in the Back") and so on.

Some of the above examples describe direct psychological and physical influence which absolutely clearly leads to physical and mental suffering. Others refer to custody conditions.

Open and Public Justice

In terms of the right to be tried in a open court hearing, the laws of Belarus do not meet international standards in two aspects: in the provision of open access to court decisions and in permission to the accused to be present at the hearing where hi/her detention in custody is decided on.

All court hearings of the cases related to the 19 December events were held in courtrooms and in an open manner. On a number of occasions, the public was unable to follow the court hearings due to poor acoustic, badly audible phrases by the parties and witnesses or because court officials read documents unintelligibly, as happened in the hearing on 22 March 2011 against Lihovid. Regardless of the fact that the courtrooms were equipped with sound-amplifying systems, they were not switched on. In most court hearings the screens were turned in a way that the public could not view the content displayed on them. All these factors hampered any efficient exercise of the right to a public hearing.

The presence of security services also affected the openness of the court hearings. Identity checks and video recording of all entering the courtroom and eavesdropping of their conversations inside the courtroom made an intimidating impact on some of those present.

It should be noted that the attendance of the trials was limited by deliberate restriction of the number of attendees in the courtroom. A substantial number of seats in the courtroom were occupied by the above-mentioned security staff; sometimes entire rows of seats were occupied by law students — from the Ministry of the Interior Academy, according to observers' reports. Moreover, there were occasions when seats were occupied by persons totally indifferent to the process. Their entry into the courtroom was arranged in bypass of the main queue. In view of the high public interest to these trials the remaining seats were insufficient to accommodate all willing to attend.

International observers from NGOs were not allowed into the courtrooms, in particular the International Observation Mission of the Committee on the Control over the Human Rights Situation in Belarus. The Mission comprised representatives of NGOs from several neigbouring countries. They were monitoring the court trials together with the general public. The Mission published statements and reports with their own assessment of these criminal trials. The Mission's observers were deported from Belarus in clear violation of the country's OSCE commitments. Not a single representative of the Mission was allowed to stay in courtroom and be present at the hearings. Remarkably, the observers' behaviour did not give rise to such measures whatsoever.

It was also noticed that the court in a number of various criminal trials demonstrated an inconsistent approach to the selection of materials to be read out and the manner of their presentation to the public. This inconsistency related to which namely material from the

prosecution's case file was read out. This had a detrimental effect on the observance of the principle of publicity and immediacy in the examination of evidence. According o the Code of Criminal Procedures, the public prosecutor collects evidence in support of the defendant's guilt and, having provided the defence with an opportunity to examine its content, submits the materials to the judge. In a hearing, the judge examines this evidence in the both parties' presence, with written materials being normally read out. In the processes under study, the prosecutor or the judge sometimes only made an announcement of what is written in a document and sometimes read a document in whole — very quickly as a rule, whereby preventing from clearly catching its content on some occasions. This inconsistent approach was also applied to the playback of video and other records.

This inconsistency, in its own right, does not violate the defendant's right to a fair trial, provided that it is not associated with manipulations aimed to incline the judge in favour of the prosecution. However, it does affect the observance of the trial transparency principle.

Presumption of Innocence

All state agencies must refrain from predetermining the outcome of a court trial, e.g. from making public statements that insist on the guilt of the accused person. In court hearings, as a general rule, the defendants must not appear handcuffed or held in cages or otherwise presented in a way indicating that they may be dangerous criminals. The mass media must refrain from giving their news in a way compromising the presumption of innocence.

At the same time, the analysis of the court trials related to the events of 19 December 2010 gives room to reasonable doubts whether the accused persons were really presumed innocent prior to pronouncing them guilty by law.

On a number of occasions, sources from state agencies, in violation of law, claimed the accused guilty in the cases in question. Such evaluations appeared in the *Sovietskaya Byelorussia* newspaper and other state-run media. Information which raised concern included comments by some state officials who only added to the doubts that the principle of the presumption of innocence was observed.

There is a non-exclusive practice in Belarus whereby the defendant under pre-trial custody is kept in the courtroom in the special cage. Such defendants enter and leave the courtroom wearing handcuffs. If the case attracts public attention and the process is covered in the media, the latter present exactly this kind of footage. Thus, from the very first day of court hearings, the accused appears before court and public in a way that suggests to perceive him/her as a dangerous offender. In most cases, such security measures applied to the accused persons are totally unjustified and not balanced in terms of the presumption of innocence.

It should be especially emphasized that, in violation of the presumption of innocence principle, the court gets familiarized with the prosecution's arguments prior to the court hearing. As we see it, getting familiarized with the full set of the prosecution's arguments is unfair on the reason that at this phase the judge falls under the influence of evidence for the prosecution.

Based on testimonies by the defendants and witnesses in the court hearings, it became evident that some materials related to these cases were leaked and made public by the media prior to, or in the course of, the trials. Some of this information could only be under control of the investigation. For instance, some state-run channels televised procedural video records where Lihovid is interrogated by his investigator.

Another way the right of the accused to be presumed innocent was violated is the pronouncement of previous convictions that were earlier imposed on them. According to international standards, the accused may be convicted only on the basis of evidence presented in court in connection with the crime he/she is charged of, but not on the basis of any evidence of his/her commission of other crimes.

Equality of Arms

The criminal process in Belarus (including the cases under study) has developed a practice whereby the public prosecutor enjoys discretion to determine which of the proofs obtained in the pre-trial proceedings he/she is going to present in court. This must be announced before the beginning of court investigation phase. As for written or other materials of the case (e.g. video and audio records), the prosecutor pronounces them in the amount at his/her discretion regardless of the fact that some of these may not or must not influence the court's decision. In theory, the defence may object against the presentation and examination in court of certain evidence for the prosecution arguing that it is obtained illegally or does not relate to the examined charges. In practice, however, the court always points out to the defence that the matters of relevancy and admissibility will be decided upon during the imposition of the sentence, i.e. after such evidence has been thoroughly examined, and that the defender may express his/her opinion in this regard during the parties' debates.

The number of motions by the prosecution requesting new evidence to be entered into the case file or to be discovered or examined is insignificant. However, the court accepts most of such motions. Motions by the defence enjoy an opposite approach. The court always demands a clear reason behind a motion and otherwise declines it as unreasonable, although it is often difficult for the defence to figure out if the requested data would contain information which is required to take a case-related decision (e.g. a motion to request data about the person of a witness or victim in order to check the reliability of their testimonies). Moreover, despite the requirement to court rulings on such motions to be substantiated, the court rarely provides necessary substantiation for its decision to decline a motion and almost never lay down the motives for such decision in a separate document. And, finally, the courts very rarely accept the defence's motions which require substantial time and effort (e.g. sending requests for legal assistance or the conduct of a forensic examination of the place of accident etc.). It is a widespread practice when motions to interrogate witnesses for the defence are accepted only if such witnesses have already appeared in court. Otherwise, a motion to summon and interrogate such witness is as a rule declined. At the same time, it is evident that the defence lacks any opportunity to compel a necessary witness to appear before court.

Thus, the parties in court are not in equal position as far as the production of evidence is concerned. In practice, this inequality is deepened by a larger degree of the court's trust to the evidence for the prosecution and lesser opportunities the defence has to obtain this or that information.

The inequality of the parties is further aggravated by the fact that the defence is deprived of any procedural powers to conduct interrogations and, hence, cannot obtain written testimonies in pre-trial proceedings to be able to read them out in court.

In addition, Article 68 of the Code of Criminal Procedures provides for possible pronouncement of testimonies by a witness or victim in court in case they are subjected to a protection measure relieving them from appearance in court hearings. This means that the court may take into consideration testimonies by anonymous aggrieved persons or witnesses.

This provision totally eliminates a chance for the defence to interrogate an "anonymous" victim/witness and, if his/her personal data are subjected to the protective measure of non-disclosure, to make a due evaluation of his/her testimony. As mentioned above, the identical situation occurred in the criminal trial of Dashkevich and Lobov.

As long as the Belarusian laws do not insist on the application of the right to confrontation, and virtually allows including written testimonies in the evidence in situations where the defence had no chance to the person who so testified, these provisions do not conform to international standards.

Right not to Testify against Oneself or to Refuse to Testify

The testimony given by the accused in court is presented as evidence for the prosecution; that arises out of Article 327 of the Code of Criminal Procedures which provides that, in case the accused agrees to testify, the first party to interrogate him is the prosecution. It is, however, comes into contradiction with the burden of proof which lies on the prosecution, while the right to defence is of primary importance for the accused, and he/she defends him or herself in trial either in person or through legal assistance.

Moreover, the provisions of Article 328, paragraph 1, clauses 1 and 2 of the Code of Criminal Procedures make it possible, at the court's discretion or by motion of either party, to read out the accused person's testimony given in pre-trial proceedings or to play back an audio record of his/her testimony or a video record or film of the interrogation, in case the accused refused to testify in court or in case there is significant controversy between this testimony and the one given in court. Thus, the right of the defendant to refuse to testify is, in fact, compromised.

This provision is widely used by Belarusian courts. It is not infrequent when the defendant's written pre-trial testimony is admitted by court as more reliable than the one given in court trial. At the same time, any statements of explicit or implicit pressure on the accused in pre-trial proceedings to compel him/her to testify in a particular way are not properly checked or taken into account. Should the accused person chooses, while in court, to exercise his/her right not to testify, his/her testimony of confession at the pre-trial phase is used by the prosecution as evidence of his/her guilt and will generally be taken as a basis for conviction. There are also situations where the defendant's refusal to provide the court with certain requested information is later negatively assessed in the sentence and used in support of his/her guilt. This also happened in the court trials related to the 19 December events. According to the described practice, the burden of proof shifts on the defendant, and this falls short of international standards.

Exclusion of Evidence Obtained Illegally Including Torture and Illegal Treatment

The way the judges reacted to the defendant's statements of torture and cruel treatment at the pre-trial investigation phase is especially notable. In some cases, the judges relied on pre-trial testimonies of the accused despite their contradiction with the ones given in court and regardless of complaints of the use of torture and intimidation. Other judges reacted to statements by witnesses or defendants about cruel treatment with additional questions. Anyway, the judges generally sufficed themselves with verification that a written testimony used in court had been signed in the lawyer's presence. On a rare occasion, the judge would go on to obtain additional facts regarding the instances of cruel treatment of detainees. The judges never sanctioned an independent investigation. Any motions by the defence requesting to exclude the evidence obtained through the claimed cruel treatment were either ignored or dismissed.

The defendants repeatedly told the court that they were subjected to beating and cruel treatment on the part of policemen while in custody. It is known, that many "informal conversations" were, in fact, real suspect interrogations. And when it was time to sign the interrogation minutes, the suspect's lawyer was allowed in. As an example, Sannikov said in court that his lawyer, whom he had not seen in private yet, was allowed only editing his testimony. This practice undermines both the lawyer's role and purpose of presence. It also questions the legality of testimony so obtained.

Right to Appeal

A procedure for reviewing court decisions must conform to general principles of fair trial. It, inter alia, means that as long as a higher instance reviews not only matters of law

but facts as well (such as the matters of guilt or innocence), then the right to be tried in his/her presence must be implemented. The Belarusian laws do not guarantee this right to everyone whose case is reviewed by an appellate court, and the lack of it, as must be admitted, is not in line with international standards.

It should also be noted that, although the parties' participation in the appellate hearing of the case is not mandatory, the public prosecutor, in practice, always takes part in the appellate proceedings in all the cases and communicates conclusions that are intended to exert influence on the court's opinion. In view of this situation, the forcible absence of the accused is a violation of the contestation principle.

The procedure for hearing a case in the oversight proceedings, as specified in the Code of Criminal Procedures, is even farther from implementation of the said principle. For instance, Article 411, paragraph 3 of the Code of Criminal Procedures provides that a prosecutor of an appropriate rank shall take part in the oversight hearing of a criminal case. At the same time, the respective convicted or acquitted person or his/her lawyer may be invited to participate "where necessary," and only on such an occasion it is possible to get familiarized with the oversight protest, if any. Keeping in mind that the oversight instance is entitled to decide on factual matters as well (including matters of guilt or innocence), deprivation of the right to give explanations at this phase should also be regarded as a violation of the contestation principle. It is even more evident in the cases when a prosecutor files a protest in support of the position against the interests of such convicted/acquitted person, and this person has no guaranteed chance to argue in his/her defence.

It should be noted that none of those accused in criminal cases related to the 19 December events and detained in custody were brought to a court of appellate or oversight instance despite their applications requesting to hear the cases in their presence. Not a single appeal resulted in a change of status (sentence period or conditions) for any of the convicted in connection with the above events.

4.2. Recommendations

The monitoring of the criminal proceedings initiated in connection with the events of 19 December 2010, has exposed certain flaws and shortcomings which are not only inherent to the law-applying practice with regard to some particular articles of the Criminal Code and the Code of Criminal Procedures but also reveal a number of problems in the judicial system as a whole. A vividly political motivation behind the criminal prosecution of participants of that peaceful event largely results from the excessive interference of the executive branch of power in the activity of the judiciary and other state and public institutes. As an objective implication of such interference, the fundamental purposes of criminal law are replaced by the purposes of suppressing dissent. Recommendations deriving out of this study aim to draw attention of those responsible for the adoption and implementation of the public policy to the ripened necessity of a systemic reform in the entire sphere of justice instead of some limited alterations selected acts of law.

In this regard, we believe it is still relevant to pay attention to recommendations by the OSCE/ODIHR addressed to various agencies in Belarus following the criminal cases in connection with the 19 December events.

Recommendations to legislators and policy makers include the removal of excessive influence of the executive/President on the regulations of the judicial community and the improvement of independence and self-governance in the judicial system. A number of amendments are to be made to *the Criminal Code, the Code of Criminal Procedures and the Law on Investigative Activity* to remove provisions which allow or not prevent violations of the rights of the accused, victims, their lawyers and other participants of a criminal process. Courthouse security provisions are to be reviewed to ensure that the chair of the court is the only one person in charge of security and that the principle of public hearing of a case is not violated. National and international observers must have free access to the courtroom. When investigating criminal cases, a procedural independence must be guaranteed to the investigative agency preventing the executive from influence on the decision making.

Recommendations to the judiciary emphasize the necessity to apply transparent criteria for the allocation of cases to particular judges and to review the system of oversight by zonal judges. The administration of criminal justice must be brought in line with international standards. The equality of arms must be ensured, and the practice of keeping defendants in cages during the trial must be eliminated. Appeals must be heard in a comprehensive and objective manner. The roles of witnesses and victims in criminal proceedings must be clearly distinguished. All proceedings must be fully transcribed. It is recommended to hear cases of public interest in a larger courtroom or facility or set up video screens to accommodate to such public interest.

Law enforcement agencies, also targeted by the OSCE/ODIHR recommendations, were urged to ensure prompt access of lawyers to persons detained in custody. Special attention is paid to the necessity of a full and comprehensive investigation into the denial of lawyers to the KGB pre-trial detention center. It is also recommended to investigate and prevent leakage of investigative materials to the state-run mass media.

The mass media are recommended to refrain from the practice of publicizing interrogation records and investigative materials at the pre-trial phase and before the sentence enters into legal force and validity.

In November 2011, the Legal Transformation Center sent the OSCE/ODIHR Report on Trial Monitoring in Belarus to all courts and state agencies related to the cases in question, whereby informing them about the observation mission's conclusions and recommendations arising out of the trial monitoring. Regretfully, no adequate response has followed. As

long as none of these recommendations has been implemented in full, the Report has so far been still relevant. The full text of consolidated recommendations by the OSCE/ODIHR is given in Annex 1.

Additionally, Belarus, as a party to international instruments in the field of human rights, shall fulfill the recommendations by the UN Committee against Torture given in the Committee's Concluding Observations (CAT/C/SR.1053) adopted at its 47th Session following the consideration of the fourth periodic report of Belarus. Extracts from this document covering the criminal cases that have connection to the 19 December events are given in Annex 2.

The Committee against Torture urges to ensure real independence of the judiciary. It it also recommended that all persons detained in custody are provided with access to all basic legal guarantees from the moment of detention including the access to legal assistance. A real opportunity to appeal arrest or detention in custody must be ensured. It is necessary to guarantee freedom from torture and cruel treatment on the part of law enforcement bodies, and any known cases must be investigated and the perpetrators must be brought to liability. Relatives and lawyers must receive prompt information about detainees.

Separately, the Committee requests the provision of *"the outcome of the investigation into the allegations raised by the Committee, including cases of Messrs. Ales Mikhalevich, Andrei Sannikov, Alexander Otroschenkov, Vladimir Neklyaev, Ms. Natalia Radina and Ms. Maya Abromchick, and the broader allegations of indiscriminate and disproportionate force used by riot police against approximately 300 people in Independence Square on December 19, 2010."* The Committee also points out the necessity to *"investigate into the cases of lawyers who represented individuals detained in connection with the events of December 19, 2010 and were subsequently disbarred, including Pavel Spelka, Tatsiana Aheyeva, Uladszimir Toustsik, Aleh Aheyeu, Tamara Harayeva, and Tamara Sidarenka, and reinstate their licenses, as appropriate."*

Based on Article 6 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms and emphasizing that the primary responsibility to promote and protect human rights and fundamental freedoms lies with the state, we believe it expedient for state agencies to examine the respective opinions, conclusions and recommendations drawn by the OSCE/ODIHR Trial Monitoring Mission and the UN Committee against Torture.

ANNEXES

SUMMARIZED RECOMMENDATIONS OF THE OSCE/ODIHR TRIAL MONITORING MISSION [1]

To legislators and policy makers:

On the role of the executive

1. To reform and improve the system of judicial self-governance with a view to freeing it from executive/Presidential decision-making on issues such as discipline or benefits and bonuses by establishing an independent judicial council for selection, promotion and disciplining of judges; in particular eliminate the power allowing the President to impose any disciplinary measure on any judge without instituting disciplinary proceedings;
2. To reform the judicial appointment system, eliminating the executive's role until the final stage; at a minimum institute a selection mechanism that gives the primary role to an authority independent of the executive and legislative powers within which a substantial number of those who sit are judges elected by their peers;
3. To refrain from the practice of temporary judicial appointments which may be prone to abuse and strengthen the lifetime tenure model for judges; allow public, transparent and directly accessible competition for recruitment of judicial vacancies rather than through court chairs and executive authorities; make all decisions on judicial appointments public;
4. To remove any influence from the executive branch on detention decisions;
5. To revamp the lawyer licensing regime to comply with the strictures set out in the UN Basic Principles on the Role of Lawyers. Specifically, remove the role of the Ministry of Justice in licensing the legal profession;
6. For public officials at all levels, to abstain from public statements affirming the guilt of the accused;
7. To ensure unhindered access for international NGO monitors at public trials.

On amending the Criminal Procedure Code

8. To amend CPC provisions related to detention so as to:
    a. provide that judges, and not prosecutors, render detention decisions in the first instance;
    b. conduct hearings regarding detention on remand and make such hearings open and the defendant's participation mandatory;
    c. ensure that detention decisions are founded on a reasonable suspicion that the individual has committed a crime, and subsequently, are based on an individualized assessment of the threat that the detainee will abscond, tamper with evidence or witnesses, or re-offend. The decision to detain someone should articulate specifically the basis for the findings;
    d. remove provisions that permit detention based solely on the gravity of the charge.
9. To review and amend the relevant provisions of the CPC to equalize the parties' procedural powers, including inter alia:
    a. strip the prosecutor of the right to order an expert assessment *proprio motu* and instead, place the decision on whether an expert assessment is needed in the hands of the court; allow defence the same right of access to expert studies as enjoyed by the prosecution;

1 Extracts from OSCE/ODIHR Report: Trial Monitoring in Belarus (March – July 2011), Warsaw, 10 November 2011. // http://www.osce.org/odihr/84873

b. ensure that the prosecution must deliver all exculpatory evidence in its possession — not only that which will be included in the file — to the defence, with clearly and narrowly defined exceptions (matters of state security, witness protection, etc.). Judges should oversee the redaction of sensitive material and ensure that the remainder is delivered to the defence;

c. ensure that the filter of relevance and probative value with regard to witnesses and evidence is applied without bias; institute tighter controls over the admission of irrelevant evidence that may have been included in the case file;

d. ensure that all statements admitted at trial, whether by video or in writing, have appropriate documentation attesting that all the appropriate rights were explained to the person providing the statement. Especially for defendants who retract at trial a previously provided written testimony, these testimonies should be excluded from the evidence and not relied upon by the court;

10. To take additional steps to eliminate prosecutorial bias, and in particular:

a. eliminate the practice whereby the trial judge is exposed to the entire prosecutor's case file, particularly the evidence, prior to the beginning of the trial. The judge's file should include only materials necessary to conduct a preliminary hearing and schedule a trial;

b. separate the adjudicatory and sentencing phases of the trial and not allow character evidence to be presented prior to sentencing;

c. eliminate the practice of exposing the judge to the defendant's criminal record prior to the determination of guilt or innocence.

11. To revise the relevant legislative provisions concerning public access to court judgments and ensure that such access is guaranteed, subject to lawful restrictions on personal data disclosure and matters of national security;

On amending the Criminal Code

12. To clarify for each criminal offence, particularly those that reference both actions and consequences/results, the precise mental element *(mens rea)* that the prosecution is required to prove. The provision should indicate whether direct or indirect intent is required. With regard to Article 293, it should be clarified whether one or all of the listed consequences are to be proven;

On amending the Law on Investigative Activity

13. To amend the CPC and the Law on Investigative Activity as follows:

a. permit only judges to authorize wiretapping and similar investigative measures that violate privacy; follow up the amendment with appropriate training on evaluating such requests in light of international standards and best practices;

b. preclude wiretapping and similarly intrusive forms of privacy invasion unless other investigative procedures have been tried and failed or they reasonably appear to be too dangerous or unlikely to succeed if tried;

c. set out in the Law on Investigative Activity the same legal standard for authorizing wiretapping and similar investigative measures that violate privacy as currently exists in the CPC.

14. To amend the Law on Investigative Activity to permit those who have been the subject of a privacy invasion, upon the close of the measure, rather than only in the case of acquittal or non-institution of criminal proceedings, to learn

a) why they have been tapped,

b) for how long, and

c) by what means, and

d) to receive evidence that the information gathered during the tap has been destroyed.

On court security

15. To review courthouse security procedures to ensure that the Chairperson of the Court is in charge of security and that this important function is not delegated to those who are not part of the judiciary.

On independent investigations

16. To undertake an independent investigation into the allegations of maltreatment raised by the suspects in these cases. As part of the investigation, review the entire collection of available video material. Ensure the investigation meets the standards set out by the UN in "The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment";

17. To undertake an independent investigation into the propriety of wiretaps as authorized in these cases. In particular assess whether the taps were "necessary" and whether they were sufficiently substantiated under a "reasonable basis for suspicion" standard connected to a "grave or exceptionally grave" crime.

On cooperation with international human rights procedures and mechanisms

18. To cooperate with international human rights procedures and mechanisms, in particular in the implementation of the recommendations included in

- a. the concluding observations of the UN Committee against Torture from 2000 and upcoming,
- b. the report of the UN Special Rapporteur on the independence of judges and lawyers from 2000,
- c. the report of the UN Working Group on Arbitrary Detention from 2005,
- d. the Universal Periodic Review of the UN Human Rights Council from 2010,
- e. the concluding observations of the UN Committee on the Elimination of Discrimination against Women from 2011.

To the Judiciary:

On structural/institutional reforms

19. To allocate cases to individual judges based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be justified;

20. To re-assess the system of zonality (oversight by zonal judges), and consider prohibiting a zonal judge from acting as reporter, or otherwise participating in an appeal, in cases in which he or she was involved in trial level oversight.

On administration of criminal justice

21. To compel the in-court testimony of important witnesses, especially those deemed necessary by the defence, as a means of safeguarding the right to confrontation. If their attendance cannot be compelled, remove their affidavit from the case file;

22. To eliminate the practice of keeping defendants in cages during the trial. Security measures applied to the defendants should be based on individual risk assessments in every case. These measures should safeguard the presumption of innocence and every effort must be made to prevent humiliating and degrading treatment. General security measures to ensure order in the courtroom should not create an impression of guilt of the defendants;

23. To revise the practice of holding perfunctory appellate hearings. Judges should be prepared to engage with both parties, focusing on material legal and factual issues which could potentially alter the judgment. The appeal judgement need not be delivered im-

mediately after the oral hearing to allow the judges sufficient time to consider in depth the matters raised. The defendant should be present at his or her appeal hearing;

24. To ensure that the role of victims and witnesses in criminal proceedings is not conflated thereby undermining the special status afforded to victims or interfering with the right to a fair trial;

25. To institute training for judges to eliminate practices that lead to a perception of prosecutorial bias;

26. To officially transcribe all proceedings, including appellate hearings, to ensure a complete and accurate record.

On court administration

27. When significant public interest in a trial is present, to take concrete measures to accommodate the anticipated numbers, for example by setting up video screens or moving to a larger courtroom or facility. Employ sound amplifying equipment;

28. To ensure that security personnel working in courthouses receive proper training on dealing with the public, wear identification, and respond courteously and respectfully to visitors. Public participants are to be welcomed and their attendance at hearings is to be facilitated — so long as decorum is maintained;

29. To end the practice of overtly filming all entrants to the court. Where strictly necessary for security purposes, to consider installing CCTV cameras, and to ensure that, in the absence of recorded illegal acts, all video records are destroyed in a timely manner.

To law enforcement agencies:

30. To investigate alleged denial of counsel to those detained at the KGB facility in the aftermath of the events of 19 December. Ensure appropriate sanctions are applied for anyone implicated in an intentional denial of counsel;

31. To review and revise the existing procedures in order to ensure prompt access to counsel for those detained in the KGB facility;

32. To investigate the source of the leaked investigative materials which were publicized in the state media, take appropriate steps to discipline those responsible and set up mechanisms to prevent such leaks in the future.

To the media:

33. To abandon the practice of broadcasting fragments of interrogations or of wiretapped conversations, especially of persons who have not been found guilty by court.

CONCLUDING OBSERVATIONS OF THE COMMITTEE AGAINST TORTURE IN RESPECT OF THE FOURTH PERIODIC REPORT OF BELARUS [EXCERPTS]

Committee against Torture
Forty-seventh session
31 October – 25 November 2011
Consideration of reports submitted by States parties under article 19 of the Convention

CONCLUDING OBSERVATIONS OF THE COMMITTEE AGAINST TORTURE
Belarus

1. The Committee against Torture considered the fourth periodic report of Belarus (CAT/C/BLR/4) at its 1036th and 1039th meetings, held on 11 and 14 November 2011 (CAT/C/SR.1036 and 1039), and adopted the following concluding observations at its 1053rd meeting (CAT/C/SR.1053).
<...>

C. Principal subjects of concern and recommendations

Fundamental legal safeguards

6. The Committee is seriously concerned about numerous, consistent reports that detainees are frequently denied basic fundamental legal safeguards, including prompt access to a lawyer and medical doctor and the right to contact family members, and this pertains especially to those detainees charged under article 293 of the Criminal Code. Such reports include cases raised jointly by several special procedure mandate holders, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and pertaining to, inter alia, Andrei Sannikov who made an allegation during trial in May 2011 about the denial of his rights to prompt access to lawyer, to contact family and to medical treatment despite injuries caused by the authorities during arrest, and Vladimir Neklyaev (A/HRC/17/27/Add.1, para. 249). While noting the Act No.215-Z of 16 June 2003 on detention procedure and conditions, the Committee expresses its serious concern at the State party's failure in practice to afford all persons deprived of their liberty, including detainees held in pretrial detention facilities of the State Security Committee (KGB) and under administrative detention, with all fundamental legal safeguards, as referred to in paragraphs 13 and 14 of the Committee's general comment No. 2 (2008) on implementation of article 2 by States parties, from the very outset of detention (arts. 2, 11 and 12).

The Committee recommends the State party to:

(a) Ensure that all detainees are afforded, by law and in practice, all fundamental legal safeguards from the very outset of their detention, including the rights to prompt access to a lawyer and a medical examination by an independent doctor, to contact family members, to be informed of their rights at the time of detention, including about the charges laid against them, and to appear before a judge promptly;

(b) Guarantee the access of detained persons, including those under administrative detention, to challenging the legality of their detention or treatment; and

(c) Take measures to ensure audiotaping or videotaping of all interrogations in police stations and detention facilities as a further means to prevent torture and illtreatment.

7. The Committee is concerned at the limited access to the central registry of detainees by family members and lawyers of detainees. It further regrets the lack of proper registration of detainees (arts. 2, 11 and 12).

The Committee recommends the State party to ensure prompt registration of all persons deprived of their liberty following apprehension and access to the register by lawyers and relatives of those detained.

8. The Committee is concerned by numerous allegations that officers in plain clothes carry out arrests, making identification impossible when complaints of torture or illtreatment were presented. The Committee notes with concern reports that a number of presidential candidates were arrested and detained by men in plain clothing (A/HRC/17/27/Add.1, para. 250) and allegations made by several detainees, including Andrei Sannikov and Vladimir Neklyaev, that they were subjected to torture by masked men while in pretrial detention (arts. 2, 12 and 13).

The State party should monitor compliance with legislation that requires all law enforcement officers on duty, including riot police (OMON), the KGB personnel, to wear identification, provide all law enforcement officers with uniforms that include appropriate visible identification to ensure individual accountability and protection against acts of torture and ill-treatment, and subject law enforcement officers who violate the Convention to investigation and punishment with appropriate penalties.

<...>

Torture

10. The Committee is deeply concerned over the numerous and consistent allegations of widespread torture and ill-treatment of detainees in the State party. According to the reliable information presented to the Committee, many persons deprived of their liberty are tortured, ill-treated and threatened by law enforcement officials, especially at the moment of apprehension and during pretrial detention. These confirm the concerns expressed by a number of international bodies, inter alia, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Human Rights Council (resolution 17/24), the United Nations High Commissioner for Human Rights and the Organization for Security and Cooperation in Europe. While noting article 25 of the Constitution which prohibits torture, the Committee is concerned about the substantial gap between the legislative framework and its practical implementation (arts. 2, 4, 12 and 16).

As a matter of urgency, the State party should take immediate and effective measures to prevent acts of torture and ill-treatment throughout the country, including by implementing policies that would produce measurable results in the eradication of torture and ill-treatment by State officials.

Impunity and lack of independent investigation

11. The Committee continues to be deeply concerned about the persistent and prevailing pattern of failure of officials to conduct prompt, impartial and full investigations into the many allegations of torture and ill-treatment and to prosecute alleged perpetrators, the lack of independent investigation and complaint mechanisms, the intimidation of the judiciary, the low level of cooperation with international monitoring bodies, which have led to serious underreporting and impunity (arts. 2, 11, 12, 13 and 16). In particular, the Committee is concerned about:

(a) The lack of an independent and effective mechanism for receiving complaints and conducting prompt, impartial and effective investigations into allegations of torture, in particular of pretrial detainees;

(b) Information suggesting that serious conflicts of interest prevent the existing complaints mechanisms from undertaking effective, impartial investigations into complaints received;

(c) The lack of congruence in information before the Committee regarding complaints presented by persons in detention. The Committee notes with serious concern the information about reprisals against those who file complaints and the cases of denial of the complaints made by detainees, including the cases of Ales Mikhalevich and Andrei Sannikov; and

(d) Reports indicating that no officials have been prosecuted for having committed acts of torture. According to information before the Committee, over the last 10 years, only four law enforcement officers have been charged with the less serious offence, "abuse of power or official authority" and "transgression of power or official authority" under articles 424 and 426 of the Criminal Code.

The Committee urges the State party to take all necessary measures to ensure that all allegations of torture and ill-treatment by public officers are promptly investigated in the course of transparent and independent inquiries and that the perpetrators are punished according to the gravity of their acts. To that end, the State party should:

(a) Establish an independent and effective mechanism to facilitate submission of complaints by victims of torture and ill-treatment to public authorities, including obtaining medical evidence in support of their allegations, and to ensure in practice that complainants are protected against any ill-treatment or intimidation as a consequence of their complaint or any evidence given. In particular, as previously recommended (A/56/44, para. 46 (c)), the State party should consider establishing an independent and impartial governmental and non-governmental national human rights commission with effective powers to, inter alia, promote human rights and investigate all complaints of human rights violations, in particular those pertaining to the implementation of the Convention;

(b) Publicly and unambiguously condemn the use of all forms of torture, addressing in particular law enforcement officers, the armed forces and prison staff, and including in its statements clear warnings that any person committing or participating in such acts or acting as an accomplice shall be held personally responsible before the law and liable to criminal penalties;

(c) Ensure that, in cases of alleged torture, suspects are suspended from duty immediately for the duration of the investigation, particularly if there is a risk that they might otherwise be in a position to obstruct the investigation; and

(d) Provide the outcome of the investigation into the allegations raised by the Committee, including cases of Ales Mikhalevich, Andrei Sannikov, Alexander Otroschenkov, Vladimir Neklyaev, Natalia Radina and Maya Abromchick, and the broader allegations of indiscriminate and disproportionate force used by riot police against approximately 300 people in Independence Square on 19 December 2010.

Independence of the judiciary

12. While noting that article 110 of the Constitution and article 22 of the Code of Criminal Procedure provide for an independent judiciary, the Committee is deeply concerned that other provisions in Belarusian law, specifically those on discipline and removal of judges, their appointment and tenure, undermine these provisions and do not guarantee judges' independence towards the executive branch of Government (arts. 2, 12 and 13). In particular, the Committee is concerned about:

(a) The intimidation and interference in the discharge of the professional functions of lawyers, as noted with concern by the Special Rapporteur on the independence of judges and lawyers (A/HRC/17/30/Add.1, para. 101). The Committee remains concerned that bar associations, although independent by law, are in practice subordinate to the Ministry of Justice and that several lawyers defending individuals detained in connection with the event on 19 December 2010 were disbarred by the Ministry of Justice; and

(b) Cases in which judicial bias in favour of the prosecution was alleged, including the case of Vladimir Russkin, who claimed he was forbidden to call his own witnesses and to question those presenting evidence against him as well as the courts' performance in several trials related to the event of 19 December 2010.

In light of its previous recommendation (A/56/44, para. 46 (d)), the Committee urges the State party to:

(a) Guarantee the full independence of the judiciary in line with the Basic Principles on the Independence of the Judiciary;

(b) Ensure that judicial selection, appointment, compensation and tenure are made according to objective criteria concerning qualification, integrity, ability and efficiency; and

(c) Investigate the cases of lawyers who represented individuals detained in connection with the events of 19 December 2010 and were subsequently disbarred, including Pavel Spelka, Tatsiana Aheyeva, Uladszimir Toustsik, Aleh Aleyeu, Tamara Harayeva, and Tamara Sidarenka, and reinstate their licenses, as appropriate.

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Evidence obtained through torture

18. While noting that article 27 of the Constitution prohibits the admissibility of evidence obtained through torture and that the State party accepted the recommendation made in the course of the universal periodic review to that end (A/HRC/15/16, para. 97.28), the Committee is concerned at reports of several cases of confessions obtained under torture and ill-treatment and at the lack of information on any officials who may have been prosecuted and punished for extracting such confessions. Information before the Committee states that in some cases, judges relied on pretrial statements of the defendants which were conflicting with their testimony made during the trial, despite allegations of duress and intimidation. The Committee regrets the lack of information about the cases of Nikolay Avtukhovich and Vladimir Asipenka, who were convicted on the basis of witness statements that were later retracted and were alleged to have been obtained through torture (art. 15).

The State party should take the steps necessary to ensure that, in practice, confessions obtained under torture or duress are not admitted in court proceedings in line with relevant domestic legislation and article 15 of the Convention. The State party should ensure that judges ask all detainees whether or not they were tortured or ill-treated in custody and that judges order independent medical examinations whenever a suspect requires one in court. The judge should exclude such statements, in particular if the suspect so requests in court and the medical examination sustains the claim. Prompt and impartial investigations should be conducted whenever there is a reason to believe that an act of torture occurred, especially in cases where the sole evidence presented is a confession. In that regard, the State party should guarantee the access of international governmental or non-governmental organizations to court proceedings. Furthermore, the Committee requests the State party to submit information on whether any officials have been prosecuted and punished for extracting confessions under torture and, if so, to provide details of the cases and any punishments or sanctions imposed on those responsible.

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TABLE OF THE ACCUSED AND CONVICTED

No.	Name of political prisoner	Charges brought	Date of detention	Place of detention in custody	Dates of court hearings	Sentence imposed	Place of imprisonment	Date of release	Grounds for release
1	**Aleksandr Arestovich**	Article 293, parts 1 and 2, Criminal Code	19.12.2010	KGB pre-trial detention center in Minsk				15.02.2011	Released under restriction of freedom of movement and obligation of due conduct. On 23.08.2011 the criminal case was canceled for the reason of no element of crime.
2	**Sviatoslav Baranovich**	Article 293, part 2, Criminal Code	15.06.2011	Pre-trial detention center No. 1, Volodarskogo St, Minsk	29.08.2011—12.10.2011	3 years of restricted liberty without imprisonment наказания.		29.08.2011	Released under restriction of freedom of movement and obligation of due conduct.
3	**Dmitriy Bondarenko**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk	26.04.2011—27.04.2011	2 years of imprisonment at a general-security correction facility.	Correction facility No. 15 in Mogilev, Republican Hospital For Prisoners in Minsk	15.04.2012	By presidential pardon. Applied for pardon personally.
4	**Artem Breus**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest until 29.12.2010. Detained under criminal prosecution on 29.12.2010.	Pre-trial detention center No. 1, Volodarskogo St, Minsk.	22.02.2011—10.03.2011	Fine of 300 basic units (approx. EUR 2,500)		10.03.2011	Released in courtroom due to punishment entailing no deprivation of liberty.
5	**Dmitriy Bulanov**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest until 29.12.2010. Detained under criminal prosecution on 12.01.2010.	Pre-trial detention center No. 1, Volodarskogo St, Minsk.	11.05.2011—26.05.2011	3 years of imprisonment in high-security correction facility.	Correction facility No. 15 in Mogilev	14.09.2011	By presidential pardon. Applied for pardon personally.

6	**Ilya Vasilevich**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest until 29.12.2010. Detained under criminal prosecution on 05.01.2010.	Pre-trial detention center No. 1, Volodarskogo St, Minsk	27.04.2011–14.05.2011	3 years of imprisonment in high-security correction facility	Correction facility No. 19 in Mogilev	14.09.2011	By presidential pardon. Did not apply for pardon.
7	**Pavel Vinigradov**	Article 293, part 2, Criminal Code	05.01.2011	Pre-trial detention center No. 1, Volodarskogo St, Minsk	27.04.2012–05.05.2012	4 years of imprisonment in high-security correction facility	Correction facility No. 22 in Ivatsevichi	14.09.2011	By presidential pardon. Did not apply for pardon.
8	**Sergey Vosniak**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk	05.05.2011–20.05.2011	2 years of conditional imprisonment		29.12.2010	Released under restriction of freedom of movement and obligation of due conduct.
9	**Ivan Gaponov**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest until 29.12.2010. Detained under criminal prosecution on 29.12.2010.	Pre-trial detention center No. 1, Volodarskogo St, Minsk	22.02.2011–10.03.2011	Fine of 300 basic units (approx. EUR2,500)		10.03.2011	Released in courtroom due to punishment entailing no deprivation of liberty.
10	**Oleg Gnedchik**	Article 293, part 2, Criminal Code	Detained on 06.01.2011. From 09.01.2011 through 25.03.2011 under restriction of freedom of movement and obligation of due conduct.	Pre-trial detention center No. 1, Volodarskogo St, Minsk	27.04.2011–14.05.2011	3.5 years of imprisonment in high-security correction facility	Correction facility No. 17 in Shklov District	02.09.2011	By presidential pardon. Applied for pardon personally.
11	**Artem Gribkov**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest. Detained under criminal prosecution on 12.01.2011	Pre-trial detention center No. 1, Volodarskogo St, Minsk	11.04.2011–26.05.2011	4 years of imprisonment in high-security correction facility; enforced alcoholism treatment (Article 107, Criminal Code)	Correction facility No. 2 in Bobruisk	11.08.2011	By presidential pardon. Applied for pardon personally.

No.	Name of political	Charges brought	Date of detention	Place of detention in custody	Dates of court hearings	Sentence imposed	Place of imprisonment	Date of release	Grounds for release
12	**Dmitriy Dashkevich**	Article 339, part 2, Criminal Code	18.12.2010	Pre-trial detention center in Zhodino; pre-trial detention center No. 1, Volodarskogo St, Minsk	22.03.2011–24.03.2011	2 years of conditional imprisonment with 2-year probation	2 years of imprisonment in high-security correction facility; 1-year extension under Article 411, Criminal Code, from 28.08.2012; increase of security level from 30.11.2012 (transfer to prison).	Pre-trial detention center in Zhodino; Correction facility No. 9 in Gorki; Correction facility No. 13 in Glubokoye; Prison No. 1 in Grodno	Not released.
13	**Andrey Dmitriev**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk	05.05.2011–20.05.2011	2 years of conditional imprisonment with 2-year probation		Documented sources are controversial: on 31.12.2010[1], according to the case file records, on 02.01.2011[2] according to the sentence, and on 03.01.2011[3] according to A. Dmitriev.	Released under restriction of freedom of movement and obligation of due conduct.
14	**Dmitriy Doronin**	Article 293, part 2, Criminal Code	14.03.2011	Pre-trial detention center No. 1, Volodarskogo St, Minsk	05.05.2011–12.05.2011	3.5 years of imprisonment in high-security correction facility	Vitba-3 correction facility	01.09.2011	By presidential pardon. Applied for pardon personally.
15	**Dmitriy Drozd**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest. Detained under criminal prosecution on 01.02.2011.	Pre-trial detention center No. 1, Volodarskogo St, Minsk	27.04.2012 – 05.05.2012	3 years of imprisonment in high-security correction facility	Correction facility No. 2 in Bobruisk	11.08.2011	By presidential pardon. Applied for pardon personally.

1 *Explanatory Note on Criminal Case No. 11011110141 (an annex to the resolution on the transfer of the case file to the prosecutor for further submission to the court);*
2 *Sentence of 20 May 2011 by the Court of Frunzenskiy District (Minsk);*
3 *http://www.svaboda.org/content/article/2265871.html; http://naviny.by/rubrics/opinion/2011/03/28/ic_articles_410_173007/*

16	**Sergei Kozakov**	Article 293, part 2, Criminal Code	27.01.2011	Pre-trial detention center No. 1, Volodarskogo St, Minsk	05.05.2011–12.05.2011	3 years of imprisonment in high-security correction facility	Correction facility No. 2 in Bobruisk	13.08.2011	By presidential pardon. Applied for pardon personally.
17	**Aleksandr Kviatkevich**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest. Detained under criminal prosecution on 04.01.2011	KGB pre-trial detention center in Minsk	11.05.2011–26.05.2011	3.5 years of imprisonment in high-security correction facility	Correction facility No. 5 in Ivatsevichi	13.08.2011	By presidential pardon. Applied for pardon personally.
18	**Aleksandr Kirkevich**	Article 293, part 2, Criminal Code	Detained on 20.12.2010 at Independence Square, sentenced to administrative arrest and fined. Detained under criminal prosecution on 28.01.2011	KGB pre-trial detention center in Minsk	27.05.2012 – 05.05.2012	4 years of imprisonment in high-security correction facility	Correction facility No. 10 in Novopolotsk	01.09.2011	By presidential pardon. Applied for pardon personally.
19	**Aleksandr Klaskovskiy**	Article 293, part 2, Articles 369 and 382, Criminal Code	21.12.2010	KGB pre-trial detention center in Minsk	11.05.2011–26.05.2011	5 years of imprisonment in high-security correction facility	Correction facility No. 17 in Shklov District	14.09.2011	By presidential pardon. Did not apply for pardon.
20	**Vladimir Kobets**	Article 293, parts 1 and 2, Criminal Code	21.12.2010	KGB pre-trial detention center in Minsk				27.12.2010	Released under restriction of freedom of movement and obligation of due conduct. On 23.08.2011 the criminal case was canceled for the reason of no element of crime.
21	**Oleg Korban**	Article 293, parts 1 and 2, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk				07.01.2011	Released under restriction of freedom of movement and obligation of due conduct. On 23.08.2011 the criminal case was canceled for the reason of no element of crime.

No.	Name of political prisoner	Charges brought	Date of detention	Place of detention in custody	Dates of court hearings	Sentence imposed	Place of imprisonment	Date of release	Grounds for release
22	**Anatoly Lebedko**	Article 293, parts 1 and 2, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk				06.04.2011	Released under restriction of freedom of movement and obligation of due conduct. On 23.08.2011 the criminal case was canceled for the reason of no element of crime.
23	**Nikita Lihovid**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 and sentenced to administrative arrest; on 28.12.2010 the administrative ruling was canceled and his status was changed to the accused of criminal charges	Pre-trial detention center No. 1, Volodarskogo St, Minsk	22.03.2011–29.03.2011	3.5 years of imprisonment in high-security correction facility	Correction facility No.10 in Novopolotsk	14.09.2011	By presidential pardon. Did not apply for pardon.
24	**Vladimir Loban**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest until 29.12.2010. Detained under criminal prosecution on 29.12.2010.	Pre-trial detention center No. 1, Volodarskogo St, Minsk	05.05.2011–12.05.2011	3 years of imprisonment in high-security correction facility	Correction facility No.17 in Shklov District	14.09.2011	By presidential pardon. Did not apply for pardon.
25	**Eduard Lobov**	Article 339, part 2, Criminal Code	18.12.2010	Pre-trial detention center in Zhodino; pre-trial detention center No. 1, Volodarskogo St, Minsk	22.03.2011–24.03.2011	4 years of imprisonment in high-security correction facility	Correction facility No. 22 in Ivatsevichi	Not released	
26	**Sergei Martselev**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	23.12.2010	KGB pre-trial detention center in Minsk	11.05.2011–16.05.2011	2 years of conditional imprisonment		16.05.2011	Released in courtroom due to punishment entailing no deprivation of liberty.
27	**Vitaliy Matsukevich**	Article 293, part 2, Criminal Code	26.03.2011	Pre-trial detention center No. 1, Volodarskogo St, Minsk	05.05.2011–12.05.2011	3 years of imprisonment in high-security correction facility	Correction facility No. 10 in Novopolotsk	13.08.2011	By presidential pardon. Applied for pardon personally.

28	**Dmitriy Medved**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest until 29.12.2010. Detained under criminal prosecution on 29.12.2010.	Pre-trial detention center No. 1, Volodarskogo St, Minsk	10.03.2011	3 years of restricted liberty without imprisonment		10.03.2011	Released in courtroom due to punishment entailing no deprivation of liberty
29	**Fedor Mirzoyanov**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest. Detained under criminal prosecution on 25.12.2010	Pre-trial detention center No. 1, Volodarskogo St, Minsk	27.04.2011–14.05.2011	3 years of imprisonment in high-security correction facility	Correction facility No. 22 in Ivatsevichi	14.09.2011	By presidential pardon. Did not apply for pardon.
30	**Alexey Mihalevich**	Article 293, parts 1 and 2, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk, pre-trial detention center No. 1, Volodarskogo St, Minsk				19.02.2011	Released under restriction of freedom of movement and obligation of due conduct. On 14.03.2011 left Belarus. Criminal case is ongoing. On international wanted list.
31	**Aleksandr Molchanov**	Article 293, part 1, Article 370, Criminal Code	06.01.2011	KGB pre-trial detention center in Minsk	01.03.2011–02.03.2011	3 years of imprisonment in high-security correction facility	Correction facility No. 15 in Mogilev	14.09.2011	By presidential pardon. Did not apply for pardon.
32	**Vladimir Nekliaev**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	19.12.2010	KGB pre-trial detention center in Minsk	05.05.2011–20.05.2011	2 years of imprisonment suspended for 2 years		Released from detention center under home arrest on 29.01.2011; released from home arrest in courtroom on 20.05.2011	Released in courtroom due to punishment entailing no deprivation of liberty.
33	**Dmitriy Novik**	Article 293, part 2, Criminal Code	23.12.2010	KGB pre-trial detention center in Minsk	01.03.2011–02.03.2011	3.5 years of imprisonment in high-security correction facility	Correction facility No. 17 in Shklov District	14.09.2011	By presidential pardon. Did not apply for pardon.
34	**Aleksandr Otroshchenkov**	Article 293, part 2, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk	01.03.2011–02.03.2011	4 years of imprisonment in high-security correction facility	Colony "Vitba-3"	14.09.2011	By presidential pardon. Did not apply for pardon.

No.	Name of political	Charges brought	Date of detention	Place of detention in custody	Dates of court hearings	Sentence imposed	Place of imprisonment	Date of release	Grounds for release
35	**Anatoly Pavlov**	Article 293, parts 1 and 2, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk				07.01.2011	Released under restriction of freedom of movement and obligation of due conduct. On 23.08.2011 the criminal case was canceled for the reason of no element of crime.
36	**Vasiliy Parfenkov**	Article 293, part 2, Criminal Code	04.01.2011	Pre-trial detention center No. 1, Volodarskogo St, Minsk	17.02.2011	4 years of imprisonment in strict-security correction facility; on 29.05.2012 sentenced to 6-month arrest under Article 421, Criminal Code.	Correction facility No. 8 in Orsha; Pre-trial detention center No. 6 in Baranovichi from 09.08.2012	13.08.2011	By presidential pardon. Applied for pardon personally.
37	**Andrey Pozniak**	Article 293, part 2, Criminal Code	Fined under administrative charges. Detained on 29.12.2010 under criminal prosecution	Pre-trial detention center No. 1, Volodarskogo St, Minsk	11.05.2011–26.05.2011	2 years of restricted liberty without imprisonment		26.05.2011	Released in courtroom due to punishment entailing no deprivation of liberty
38	**Anastasia Polazhenk**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk	05.05.2011–20.05.2011	1 year of conditional imprisonment		17.02.2011	Released under restriction of freedom of movement and obligation of due conduct.
39	**Andrey Protasenia**	Article 293, part 2, Criminal Code	09.02.2011	KGB pre-trial detention center in Minsk	27.04.2012–05.05.2012	3 years of imprisonment in high-security correction facility	Correction facility No. 2 in Bobruisk	01.09.2011	By presidential pardon. Applied for pardon personally.
40	**Natalia Radina**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk				28.01.2011	Released under restriction of freedom of movement and obligation of due conduct. Left Belarus on 01.04.2011. On 23.08.2011 the criminal case was canceled for the reason of no element of crime.

41	**Vitaly Ryma-shevskiy**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	19.12.2010	KGB pre-trial detention center in Minsk	05.05.2011– 20.05.2011	2 years of conditional imprisonment		31.12.2010	Released under restriction of freedom of movement and obligation of due conduct
42	**Andrey Sannikov**	Article 293, part 1, Criminal Code	19.12.2010	KGB pre-trial detention center in Minsk	27.04.2011– 14.05.2011	5 years of imprisonment in high-security correction facility	Correction facility No. 10 in Novopolotsk, Correction facility No. 2 in Bobruisk, Vitba-3 correction facility	14.04.2012	By presidential pardon. Applied for pardon personally.
43	**Pavel Severinets**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk	11.05.2011– 16.05.2011	3 years of restricted liberty to be served at place of correction	Village of Kuplin, Brest Region	Not released	
44	**Evgeny Sekret**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to administrative arrest. Detained under criminal prosecution on 17.01.2010.	Pre-trial detention center No. 1, Volodarskogo St, Minsk	05.05.2011– 12.05.2011	3 years of imprisonment in high-security correction facility	Correction facility No. 15 in Mogilev	11.08.2011	By presidential pardon. Applied for pardon personally.
45	**Nikolay Statkevich**	Article 293, part 1, Criminal Code	19.12.2010	KGB pre-trial detention center in Minsk	11.05.2011– 26.05.2011	6 years of imprisonment in high-security correction facility; increase of security level from 12.01.2012 (transfer to prison)	Correction facility No. 17 in Shklov District; Prison No. 4 in Mogilev	Not released	
46	**Dmitriy Uss**	Article 293, part 1, Criminal Code	20.12.2010, 26.05.2011	KGB pre-trial detention center in Minsk	11.05.2011– 26.05.2011	5.5 years of imprisonment in high-security correction facility	Correction facility No. 19 in Mogilev; Republican hospital for prisoners in Minsk	Released under restriction of freedom of movement and obligation of due conduct on 20.12.2010. Taken into custody in courtroom on 26.05.2011. Released on 01.10.2011	By presidential pardon. Did not apply for pardon.

47	**Oleg Fedorkevich**	Article 293, part 2, Criminal Code	19.12.2010	Pre-trial detention center No. 1, Volodarskogo St, Minsk	05.05.2011–12.05.2011	3.5 years of imprisonment in high-security correction facility	Correction facility No. 19 in Mogilev	14.09.2011	By presidential pardon. Did not apply for pardon.
48	**Aleksandr Feduta**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	20.12.2010	KGB pre-trial detention center in Minsk	05.05.2011–20.05.2011	2 years of conditional imprisonment with 2-year probation		08.04.2010	Released under restriction of freedom of movement and obligation of due conduct
49	**Irina Halip**	Article 293, parts 1 and 2, Criminal Code, re-qualified to Article 342, part 1, Criminal Code	19.12.2010	KGB pre-trial detention center in Minsk	11.05.2011–16.05.2011	2 years of imprisonment suspended for 2 years		Released from detention center under home arrest on 29.01.2011; released from home arrest in courtroom on 16.05.2011	Due to punishment entailing no deprivation of liberty
50	**Vladimir Homichenko**	Article 293, part 2, Criminal Code	Detained on 19.12.2010 at Independence Square and sentenced to 15-day administrative arrest. Status changed to the accused under criminal charges on 27.12.2010.	Pre-trial detention center No. 1, Volodarskogo St, Minsk	27.04.2012–05.05.2012	3 years of imprisonment in high-security correction facility with enforced security measures (Article 106, Criminal Code) and enforced alcoholism treatment (Article 107, Criminal Code) .	Correction facility No. 19 in Mogilev	11.08.2011	By presidential pardon. Applied for pardon personally.
51	**Vladimir Yaromenok**	Article 293, part 2, Criminal Code	Detained on 20.12.2010. Served his administrative arrest twice in December 2010 – January 2011. Detained again on 29.01.2011 under criminal prosecution.	KGB pre-trial detention center in Minsk	27.04.2011–14.05.2011	3 years of imprisonment in high-security correction facility	Vitba-3 correction facility	11.08.2011	By presidential pardon. Applied for pardon personally.

Afterword...

Square 2010 through the eyes of Belarusian human rights defenders

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